TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1955

No. 351

R. V. ARCHAWSKI, ET AL., PETITIONERS,

vs.

BASIL HANIOTI, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 26, 1955.

CERTIORARI GRANTED OCTOBER 24, 1955.

INDEX TO APPENDIX

(Record pages 1399 to 1402)

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 319 OCTOBER TERM, 1954.
Argued April 20 and 21, 1955 Decided June 3, 1955
Docket No. 23566

R. V. ARCHAWSKI, et al.,
Libellants-Appellees,

against

BASIL HANIOTI, etc., et al.,
Respondents,
BASIL HANIOTI, etc.,
Respondent-Appellant.

Before: FRANK, MEDINA and HINCKS, *Circuit Judges*.

Defendant appeals from a judgment and decree of the United States District Court for the Southern District of New York, which contains a direction that a writ of attachment against the person of defendant shall issue for its enforcement. In admiralty. Lawrence E. Walsh, Judge. Opinion below reported 129 F. Supp. 410. Reversed and remanded.

Harry D. Graham, New York City, New York, for libellants-appellees.

Leonard Altschul, New York City, New York, (Samuel Bader, New York City, New York, of Counsel), for respondent-appellant.

MEDINA, *Circuit Judge*:

The record before us presents a maze of complications, procedural and otherwise. Of the various points raised, however, it is necessary to discuss but one, as we have concluded that there was no jurisdiction in admiralty and, there being no other alleged basis of federal competence, the case must be dismissed.

The libel, by several hundred prospective passengers on the "City of Athens", a vessel of Honduran registry, names as respondent Basil Hanioti, and he is sued "individually, and doing business as Sociedad Naviera Transatlantica, 5 S.A., Compania De Vapores, Mediterranea, American Mediterranean Steamship Line, Ltd., American Mediterranean S/S Agency, Inc., and Basile Shipping Company, Inc.," it being alleged that the concerns whose names are thus set forth are "ostensible firm names," in fact mere "alter egos" of Hanioti, who is accordingly described as the owner of and in control of the "City of Athens." The use of these alter egos or "mere shams" is alleged to be part of "a designed plan for the purpose of shielding himself from possible liability for the fraudulent acts hereinafter stated and by virtue of which the respective libellants have each been damaged."

It is then alleged that between November 9, 1946, and 6 July 23, 1947, Hanioti and his alter egos "then being hopelessly insolvent, unbeknown to any of the libellants," advertised the "City of Athens" as a common carrier of passengers for hire, that libellants paid certain sums as passage money for a voyage scheduled for July 15, 1947, and that both the voyage and the vessel were abandoned by Hanioti. The balance of the libel is devoted to an enumeration of various fraudulent practices said to have been resorted to by Hanioti, such as secreting himself and his

assets, maintaining "a secret residence in New York the location of which, after due diligence, cannot be found," and otherwise defrauding libellants of the moneys they had paid. The libel avers that the moneys were "collected to the respondent's account" and that they "were wrongfully and deliberately applied to his own use and benefit in reckless disregard of his obligations to refund the same."

While a contract for the transportation of passengers by sea is a maritime contract, and a suit for its enforcement would plainly be within the admiralty jurisdiction of the District Court, this libel sets forth no such claim, but rather is in the nature of the old common law *indebitatus assumpsit*, for money had and received, based upon the wrongful withholding of moneys by respondent, on the theory that in equity and good conscience he is under a duty to pay them over to libellants. *Silva* v. *Bankers Commercial Corporation*, 163 F. 2d 602 (C.C.A. 2, 1947); *United Transp. & L. Co.* v. *New York & Baltimore T. Line*, 185 Fed. 386 (C.C.A. 2, 1911). If the libel is viewed as stating some sort of a claim based upon tortious conduct in the nature of fraud, as seems to have been the intent of the pleader, the case against admiralty jurisdiction is even clearer.

Reversed and remanded to the District Court for dismissal for lack of admiralty jurisdiction.

10

Respondent's Notice of Appeal From Final Decree.

(Record page 392)

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Sirs:

PLEASE TAKE NOTICE that the respondent Basil Hanioti hereby appeals to the Court of Appeals for the Second Circuit from the final decree docketed as Judgment #59801
11 on January 11, 1955, in the above entitled proceeding and that this appeal is from each and every part thereof.

Dated, New York, March 24, 1955.

Yours &c.,

LEONARD ALTSCHUL /s
Leonard Altschul,
Attorney for Respondent Basil Hanioti,
Office & P. O. Address,
No. 384 East 149th Street,
Borough of Bronx,
City of New York.

To:

12 HARRY D. GRAHAM, Esq.,
Attorney for Libellants,
No. 76 Beaver Street,
Borough of Manhattan,
City of New York.

CLERK OF UNITED STATES DISTRICT COURT
FOR SOUTHERN DISTRICT OF NEW YORK.

Opinion/Order of United States District Court.

(Record pages 317 to 324)

=24

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

APPEARANCES:

HARRY D. GRAHAM, Esq., Proctor for Libellants, 76 Beaver Street, New York 5, New York. 14

LEONARD ALTSCHUL, Esq. (ARCHIBALD PALMER, Esq., of Counsel), Proctor for Respondent, 384 East 149th Street, Bronx, New York.

OPINION

WALSH, *D.J.*

After a decree had been entered in favor of libellants respondent moved to vacate the decree as one entered upon a default and to vacate the order for body execution entered in connection with that decree. Both motions are denied.

The trial of this action was duly scheduled for November 23, 1954. On that date the attorneys of record for the respondent Hanioti appeared before the court, stating they had been unable to get in touch with their client, had no idea where he could be reached, and did not know when or if he would return. They conceded that he was already in default in appearing for oral examination although an order directing his appearance had been made from the bench by Judge Sugarman, and it is uncontradicted that he was in default on three other occasions in connection 15

with this matter. They were unprepared to offer any defense. The attorney for the libellants submitted his proof and a decree was granted in their favor. On December 6th the decree was formalized and signed by the Court embodying the judgment and authorizing the issuance of execution against the person of Hanioti.

Thereafter, on December 7th, respondent Hanioti first manifested an interest in these proceedings. By a show cause order he moved to vacate the decree and to enjoin its enforcement by body execution. His explanation for his failure to cooperate with his attorneys on November 23rd was that he had had a falling out with them as long
17 ago as December, 1953, that he had discharged them, that they had refused to represent him, that they refused to turn over papers in their possession pertaining to his various law suits to his present attorney (who was not of record in this case), and refused to give him any information as to the date of trial in the present action.

However, his own affidavit belies these excuses as well as his claim made in court by one of his present attorneys, that he had been under the impression that the present action was dismissed by Judge Ryan in 1952. His affidavit asserts that on November 9th his attorneys of record notified his business associate, through whom he customarily received communications, one Stathos, that the trial date was approaching and that they would not represent
18 him. This message was relayed to him. Even if it is true, as he claims, that at that time they told Stathos the trial date was the first week in December, it does not excuse his failure to ascertain the exact and correct date independently, considering the alleged nature of his relations with these attorneys, nor his failure to take those steps which any reasonable litigant, with bona fide intentions of defending a suit for over $130,000, would take under similar circumstances in the belief that the date of trial

was less than one month distant. There is no basis for believing that any other attorney represented him at the date of trial. He did not ask his present attorney, Mr. Altschul, to represent him until after its conclusion. He took no steps to notify the court of any substitution of attorneys until even later.

These facts, his testimony under oath before me, and the record of his testimony before Judge Ryan, convince me that the default, if it may so be called, was wilful and that the respondent is an unbelievable scoundrel, indifferent to money judgments against him because he believes himself judgment proof under the ordinary methods of execution. The motion to vacate the decree is accordingly 20
denied.

The only question remaining is whether body execution is appropriate in this case. Libellants' action is based on the breach of a contract of affreightment. In 1947 they paid for passage from New York to various European ports or back aboard a vessel known as City of Athens. The voyages, scheduled for July 15, 1947 and thereafter, never took place, because, prior to that date, the vessel was libelled by various creditors and sold. The passage money was never refunded although there is no doubt that under the terms of the contract itself and under the controlling decisions, the passengers were entitled to recover in admiralty from the ship owner. *The Moses Taylor*, 71 U. S. 411, 427; *The Aberfoyle*, Fed. Cas. No. 16, aff'd. Fed. Cas. 21
No. 17; *Foster* v. *Compagnie Francaise de Nav.* A. *Vapeur*, E. D. N. Y., 237 F. 858; *Benedict on Admiralty* (6th Ed.), Vol. I, § 61.

The nominal owner of the ship was a Panamanian corporation, Sociedad Naviera Transatlantica, S.A. This vessel was substantially its only asset. *City of Athens*, 1949 A. M. C. 572, 576. The corporation kept "some sort of books".

It kept no separate bank account. It, as well as other ship-owning corporations set up and managed by Hanioti along the same lines, were, by his own admission, "mere paper companies". Their assets were freely intermingled because it was "immaterial" to Hanioti in what name checks were made out or received. They were all one group, under the control of Hanioti.

It is an elementary proposition of law that where the corporate form is used merely as an alter ego, or business conduit of a person, it may be disregarded to prevent fraud. *Fletcher Cyc. Corps.* (Perm. Ed.), Vol. 1, §§ 41, 44 and 46 and cases there cited; *A. B. Dick v. Marx*, S. D. N. Y., 48 F. Supp. 775, 776, aff'd. 2 Cir. 155 F. 2d 923; *In Re V. Loewer's Cambrinus Brewery Co.*, S. D. N. Y., 74 F. Supp. 909, 913, aff'd. 2 Cir. 167 F. 2d 318; *Hollander v. Henry*, 2 Cir. 186 F. 2d 582; *African Metals Corp. v. Bullowa*, 288 N. Y. 78, 85, 41 N. E. 2d 466; *S. E. S. Realty Co., Inc. v. George M. Adrian & Co.*, 285 N. Y. S. 1018, 159 Misc. 26. On the facts in this case it is clear that the libellants were entitled to recover in admiralty from respondent Hanioti personally, as the ship owner, on the maritime contract.

Admiralty Rules 3 and 20 point to State procedures for enforcement of admiralty decrees. New York Civil Practice Act, Sections 764 and 826, provides for execution against the person in certain types of actions. Section 826(9) provides for arrest:

> "In an action upon contract, express or implied, where it is alleged in the complaint that the defendant was guilty of fraud in contracting or incurring the liability, or that, since the making of the contract, or in contemplation of making the same, he has removed or disposed of his property with intent to defraud his creditors; or is about to remove or dispose of the same

with like intent; but where such allegation is made, the plaintiff cannot recover unless he proves the fraud on the trial of the action; * * *."

The New York cases hold that a representation of solvency or concealment of insolvency by a purchaser when buying goods on credit, coupled with an intent not to pay for them is fraudulent. It is enough to authorize arrest under this subdivision. *Wright & Brown*, 67 N. Y. 1; *Tannenbaum v. Reich*, 2 N. Y. S. 731; Cf. *Norris v. Talcott*, 96 N. Y. 100; *Hotchkin v. Third Nat. Bk. of Maloüe*, 127 N. Y. 329, 344; and see *Anonymous*, 67 N. Y. 598. There is no difference between buying goods with the intent not 26
to pay for them and taking unearned moneys with the intent not to perform the services. *The Henry W. Breyer*, 1927 A. M. C. 290, 303; and see *Lehrer v. Nusbaum*, 233 N. Y. S. 340, 133 Misc. 710.

There is sufficient evidence in the record before the Court to justify the inference not only that respondent was insolvent, knew he was insolvent, but also that he took this money with the intent not to perform.

A. Respondent was insolvent:

In the proceeding in Baltimore creditors' claims of $775,457.82 were allowed. Only $400,000 was realized from the sale of the ship, the corporation's only asset; and less than $401,837.71 was available for distribu- 27
tion. Insolvency may be inferred from the fact that shortly after the purchase judgments were entered against the purchaser grossly in excess of the amount realized from his property. *Tannenbaum v. Reich*, 2 N. Y. S. 731.

B. Respondent knew he was insolvent:

Hanioti, in the Baltimore proceeding, admitted that prior to the filing of the libel in the Baltimore pro-

ceeding, he knew the corporate owner was in a precarious position and had practically no funds.

C. Respondent intended not to perform:

1. Not only did he accept passage money right up until the libel was filed, but the record shows he continued to receive it even after the filing of the libel and the attachment of the vessel by his creditors.

2. At no time was the vessel supplied or provisioned to make the scheduled July 15th voyage.

3. There were no funds in any of Hanioti's various
29 coffers to provide such supplies and provisions. Hanioti's account with the ticket agent was virtually empty. The Court found no assets belonging to the Sociedad except the vessel. *City of Athens*, 1949 A. M. C. 572, 576. According to Hanioti's own testimony before Judge Ryan, referred to by both parties in connection with this motion, the Compania De Vapores, through whose accounts most of the disbursements for the ship owning corporation were made, also "collapsed" along with his other companies in 1947.

These facts are sufficient to satisfy the Court that Hanioti accepted the passage money, most of which was received within a month of the promised voyage, with the knowledge
30 that the vessel could not make the July crossing and with the intention of defrauding the libellants.

The action is on the contract, thus within the admiralty jurisdiction of the Court. The libel alleges fraud in the contracting of the agreement which was broken. This fraud has been established to my satisfaction. Under the New York statutes this is enough to sustain a body execution.

The libellants are also entitled to body execution on the further ground that Hanioti disposed of or removed his property with intent to defraud. By his own admission he had the unqualified power to dispose of the funds paid to his ticket agent by the libellants. In New York, it has been held that such funds, paid for passage on ships for voyages which were not undertaken form constructive trust funds for the benefit of the prospective passengers. *Acker* v. *Hanioti*, 92 N. Y. S. 2d 914, 276 App. Div. 78. No satisfactory explanation was ever made as to their whereabouts. Like the District Court for the district of Maryland, I disbelieve his testimony that they had been ultimately paid over to Todd. Even if they were, in view 32
of his financial circumstances, he had no right to use them to pay an old debt unrelated to the voyage in question. His diversion of these moneys to the Vapores account where they were mingled with funds which had been paid to his other companies and out of which they could not be traced, and his failure to keep separate records and accounts for the Sociedad, constituted a disposal with intent to defraud.

Motions to vacate the decree and the order for body execution contained therein are denied. Costs to libellants. It is so ordered.

LAWRENCE E. WALSH,
United States District Judge.

Dated: February 9, 1955.

34

Final Decree.

(Record pages 293 and 294)

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

This cause having duly come on to be heard in regular order on November 23, 1954, upon all prior proceedings, the pleadings and the proofs and having been argued and submitted by Harry D. Graham, Esq., proctor in behalf
35 of libellants, and Frank H. Cooper & Frank Delaney, proctors in behalf of respondent, by Frank H. Cooper, Esq., advocate, the Court, after due deliberation, having found the allegations contained in the libel to be amply supported upon the record and that the passage monies procured from the libellants by the respondent, and those for whom he is responsible, in consideration of contracts for passage upon the steamship "City of Athens" were fraudulently procured; that such passage monies were unearned and, as such, constituted constructive trust funds and, upon abandonment of the vessel and her scheduled voyages for which the libellant passengers were booked, such passenger monies were refundable to the libellants and though payment thereof by the libellants was duly demanded, the
36 respondent refused to make such repayment and actually had converted said funds to this own use and the use of those for whom he is responsible and the Court, further, having directed a decree to be entered in favor of the libellants with costs, heretofore taxed in the sum of $35.00,

Now, on motion of Harry D. Graham, Esq., proctor for the libellants, it is

Final Decree

37

ORDERED, ADJUDGED AND DECREED, that the libellants recover of the respondent, Basil Hanioti, their respective passage monies as scheduled in the libel, aggregating the sum of $130,383.69, and costs as taxed at $35.00, and said respondent, Basil Hanioti, is hereby directed to pay said sum of $130,383.69 and costs in sum of $35.00, making in all the total sum of $130,418.69, with interest thereon at 6% from the 23rd day of July, 1947, until paid, to the libellants through their proctor, Harry D. Graham, Esq., for distribution amongst them together with their costs as taxed;

38

FURTHER ORDERED, ADJUDGED AND DECREED, that unless this decree be satisfied within ten days from the date of service of a copy hereof, with notice of entry, upon the respondent's proctors herein, or unless execution upon this decree be stayed by an appeal with proper and approved security thereon during said ten day period; the Clerk of the Court is directed to issue to the United States Marshal a writ of attachment against the person of said Basil Hanioti to compel him to perform and obey this decree.

Dated, New York, N. Y., December 6, 1954.

LAWRENCE E. WALSH,
United States District Judge.

A TRUE COPY

39

WILLIAM V. CONNELL, Clerk
By EUGENE LIEBER,
Deputy Clerk

(SEAL)

40

Libel.

(Record pages 245 to 250)

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The libels and complaints of R. V. Archawski, Mrs. R. Acker, P. Agresti et al. (list of libellants continues), individually and severally,

against

41

Basil Hanioti, individually, and doing business as Sociedad Naviera Transatlantica, S. A., Compania de Vapores, Mediterranea, American Mediterranean Steamship Line, Ltd., American Mediterranean S/S Agency, Inc., and Basile Shipping Company, Inc., in causes of contract, civil and maritime, respectfully shows and alleges, upon information and belief:

First: That at all of the times hereinafter mentioned and as set forth in libellants' annexed Exhibit 1, the respondent, Basil Hanioti, doing business under his own name and as Sociedad Naviera Transatlantica, S.A., Compania de Vapores Mediterranea, American Mediterranean Steamship Line, Ltd. and American Mediterranean Steamship Agency, Inc., maintained his principal office and place of business at 44 Whitehall St., City of New York, owned and controlled a certain passenger vessel known as the "City of Athens" of Honduran registry.

42

SECOND: That the aforesaid ostensible firm names, under which the respondent operated, were in fact his alter egos and mere shams created by him and used by him to further a designed plan for the purpose of shielding himself from possible liability for the fraudulent acts hereinafter stated and by virtue of which the respective libellants have each been damaged.

THIRD: Between November 9th, 1946 and July 23rd, 1947, the respondent and his alter egos then being hopelessly insolvent, unbeknown to any of the libellants, advertised and held out the steamer "City of Athens" as a common-carrier of passengers for hire.

FOURTH: On the respective dates set forth beside their names in the attached exhibit 1, the libellants paid the respective sums set forth beside their names for passage upon said vessel, as scheduled, commencing with an advertised and scheduled voyage for July 15th, 1947 and thereafter.

FIFTH: On or about the 24th day of July, 1947, through his alter egos, Hanioti, the respondent, notified the passenger-libellants herein of his abandonment of the voyages scheduled and fled the United States to Europe, abandoning the vessel also.

SIXTH: That the aforesaid sums paid by the libellants were collected to the respondent's account and, though unearned passage monies, were wrongfully and deliberately applied to his own use and benefit in reckless disregard of his obligations to refund the same and; though refunds were duly demanded he has refused to pay the same and has secreted himself away and manipulated his assets as hereinafter set forth for the purpose of defrauding the libellants.

46 *Libel.*

SEVENTH: That respondent is now the owner of two vessels known as the "Basile" and the "Carmen", the latter of which is presently in the port of New York and within the jurisdiction of this Court, and said respondent is presently conducting business under the name of "Basile Shipping Company, Inc." although after diligent efforts no office for such ostensible firm, which in fact is his alter ego, can be found.

EIGHTH: That said "Basile Shipping Company, Inc." was created by the respondent for, and as, an attempt to shield himself from liability and satisfaction of any decrees
47 that may be issued against him in connection with his manipulations and operations aforementioned, and is in fact a fraud and a sham and a mere dummy within his control.

NINTH: That in addition to the aforesaid fraudulent acts of the respondent, he committed other transactions, made conveyances, assignments and other manipulations with the intent to deceive and in fraud of the libellants.

TENTH: That during the pendency of process herein, the respondent has, or will have, goods, assets, credits, chattels, effects and monies to his account, or to the account of his alter ego, Basile Shipping Company, Inc., in the hands and control of Sieling & Jarvis of 50 Broadway,
48 Borough of Manhattan.

ELEVENTH: Respondent maintains a secret residence in New York the location of which, after due diligence, cannot be found.

TWELFTH: That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Court.

THIRTEENTH: That the refusal of the respondent, and those for whom he is responsible, to refund or return the respective unearned passage monies paid by the libellants has damaged each of the libellants in the respective sums set forth beside their names in the annexed exhibit No. 1 which is made part of this libel.

WHEREFORE, libellants pray that a citation in due form of law, according to the course of this honorable Court in cases of admiralty and maritime jurisdiction, may issue against the respondent Basil Hanioti and each of the respondents hereinabove named and that he may be required to appear and answer under oath this libel and all and singular the matters aforesaid and if he cannot be found that the goods, chattels and, if none can be found, that the credits and effects to the respondents or Basile Shipping Company, Inc. account in the hands and custody of Sieling & Jarvis of 50 Broadway, New York City, including respondent's vessel s/s Carmen, may be attached to the sum of $130,632.79, that being the aggregate of the respective libellant's damages, with costs, and that said Sieling & Jarvis may be cited to appear and answer on oath as to the credits and effects in their hands and custody belonging to, and to the account of said Basile Hanioti or Basile Shipping Company, Inc. and that this honorable Court may be pleased to grant its decree or decrees for the respective damages of each of the libellants herein, with costs and such other and further relief as in law and justice they may be entitled to receive.

Sept. 16, 1932.

HARRY D. GRAHAM,
Proctor for Libellants,
76 Beaver Street,
New York 5, N. Y.

52

Exhibit I Annexed to Libel.

LIBELLANTS' SCHEDULE

Name	*Ticket No.*	*Fare Paid*	*Itinerary*	*Date Paid*
R. V. Archawski	814, 815, 816, 817 & 818	$3108.00	Mars/NY	6/17/47
Acker, Mrs. R.	460	249.10	Naples/NY	4/27/47
Agresti, P.	861 862	616.00	Naples/NY	6/26/47
	Total	$130,383.69		

53

et al., (libellants' schedules continue)

(Verification of Libel, Sept. 16, 1952)

54

IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 3rd day of June one thousand nine hundred and fifty-five.

Present: Hon. Jerome N. Frank, Hon. Harold R. Medina, Hon. Carroll C. Hincks, Circuit Judges.

R. V. ARCHAWSKI, ET AL., Libellants-Appellees,

v.

BASIL HANIOTI, ETC., ET AL., Respondents-Appellants

Appeal from the United States District Court for the Southern District of New York.

JUDGMENT—June 3, 1955

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is reversed and the action be and it hereby is remanded to said District Court for dismissal for lack of admiralty jurisdiction in accordance with the opinion of this Court; with costs to the appellant.

(S.) A. Daniel Fusaro, Clerk.

[File endorsement omitted]

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1955

No. 351

R. V. ARCHAWSKI, ET AL., Petitioners,

vs.

BASIL HANIOTI, ETC.

ORDER ALLOWING CERTIORARI—Filed October 24, 1955

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as through filed in response to such writ.

(5892-3)

INDEX TO PETITION

CASES CITED

STATUTES CITED

OTHER AUTHORITIES CITED

capias, as the libelant may, in his libel or information pray for or elect; in either case with a clause therein to attach his goods and chattels, or credits and effects in the hands of the garnishees named in the libel to the amount sued for, if said respondent shall not be found within the district. But no warrant of arrest of the person of the respondent shall issue unless by special order of the court, on proof of the propriety thereof by affidavit or otherwise."

"28 U. S. C. A. *Supreme Court Admiralty Rule 22.* All libels in instant causes, civil and maritime, shall be on oath or solemn affirmation and shall state the nature of the case, as, for example, that it is a cause civil and maritime, of contract, or a tort or damage, or of salvage, or of possession, or otherwise; as the same may be; and, if the libel be in rem, that the property is within the district; and, if in personam, the names and places of residence of the parties so far known. The libel shall also propound and allege in distinct articles the various allegations of fact upon which the libelant relies in support of his suit so, that the respondent or claimant may be enabled to answer distinctly and separately the several matters contained in each article; and it shall conclude with a prayer for due process to enforce his rights in rem, or in personam, as the case may be, and for such relief and redress as the court is competent to give in the premises."

"28 U. S. C. A. *2107.* Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed within thirty days after entry of such judgment, order or decree.

In such action, suit or proceeding in which the United States or any officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.

In any action, suit or proceeding in admiralty, the notice of appeal shall be filed within ninety days after the entry of the order, judgment or decree appealed from, if it is a final decision, and within fifteen days after its entry, if it is an interlocutory decree.

The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree.

This section shall not apply to bankruptcy matters or other proceedings under Title 11. June 25, 1948, c. 646, 62 Stat. 963; amended May 24, 1949, c. 139, secs. 107, 108, 63 Stat. 104."

"*28 U. S. C. A. Sec. 1291.* The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court for the Virgin Islands, except where a direct review may be had in the Supreme Court. As amended Oct. 31, 1951, c. 655, secs. 48, 65 Stat. 726."

Statement of the Case

On September 16, 1952, in the United States District Court for the Southern District of New York, a libel in personam was filed in the individual behalves of some 350-odd libelants against the respondent, Basil Hanioti, individually and doing business under various corporate names. The libel alleged maritime causes of action for the recovery of passage monies which each libelant had paid for prospective voyages on the steamer *City of Athens*, alleged to have in fact been owned by Hanioti, and which voyages were never performed nor substitute transportation provided or their passage monies refunded though due demands therefor had been made.

For the purpose of obtaining an order for body attachment on the ground of fraud and absence from the jurisdiction, essential allegations of a maritime cause of action were supplemented by further allegations to the effect that at the times the respondent was advertising the *City of Athens* as a common carrier of passengers for hire he was,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 351

R. V. ARCHAWSKI, et al.,

Petitioners,

v.

BASIL HANIOTI, etc.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HARRY D. GRAHAM,
Counsel for Petitioners,
76 Beaver Street,
New York 5, N. Y.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. .....

R. V. ARCHAWSKI, et al.,

Petitioners,

v.

BASIL HANDIOTI, etc.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, three hundred and fifty odd, prospective passengers of the steamship *City of Athens*, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the above entitled matter.

The Opinions of the Courts Below

The opinion of the United States District Court for the Southern District of New York (R. 317-324, Walsh, D. J., sitting in admiralty, printed in the separate appendix hereto infra pp. 5-11) is reported in 129 F. Supp. 410.

The opinion of the Court of Appeals for the Second Circuit (Frank, Medina and Hincks, C. JJ., opinion by Medina, C. J.) is printed in the separate appendix infra pp. 1-3 and is not yet reported.

Jurisdiction

The decision and judgment of the Court of Appeals for the Second Circuit sought to be reviewed, was entered on June 3, 1955.

Jurisdiction of this Court is found in 28 U. S. Code Secs. 1254(1), 2101(c) and 2106

Questions Presented

1. Whether admiralty has jurisdiction of actions seeking the recovery of passage monies paid as consideration for maritime contracts of carriage which were never performed or substitute transportation provided.

2. After the proofs are in, whether jurisdiction of the subject matter in admiralty is controlled by allegations of the libel as construed by the application of the technical common law rules of pleading, or by the proofs as reconciled to the libel under admiralty's liberal rules of practice.

3. Whether the Court of Appeals had jurisdiction of an appeal taken from a final decree in admiralty 108 days after its entry where there was no extension of time within which to appeal granted by the District Court.

Statutes Involved

"*28 U. S. C. A. 2111.* On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

"*28 U. S. C. A. Supreme Court Admiralty Rule 2.* In suits in personam the mesne process shall be by a simple monition in the nature of a summons to appear and answer the suit, or by simple warrant of arrest of the person of the respondent in the nature of a

unbeknownst to them, hopelessly insolvent, and that, on July 21, 1947, he abandoned the vessel and projected voyages and fled the United States to Europe; that he had converted the unearned passage monies and had secreted himself away and so manipulated his assets to make himself judgment-proof for the purpose of defrauding the libelants and was shielding himself behind another dummy corporation which was his alter ego. Process was prayed with the further request that if Hanioti could not be found that goods and chattels to the credit of his alter ego, Basile Shipping Company, Inc., and particularly a vessel known as the *Carmen*, then in New York, be attached. The *Carmen* was thereupon attached by the U. S. Marshal and Hanioti appeared by counsel and answered the libel, under oath, generally denying the allegations. Thereafter a series of defaults on his part ensued to the extent of disregarding peremptory orders from the Bench and a refusal on his part to co-operate with his proctors of record.

Finally the action duly came to trial and Hanioti defaulted in personally appearing, but was represented by his proctors of record. Libelants put in their proofs, consisting, inter alia, of Hanioti's own testimony under oath and his general passenger agent's testimony under oath, both taken before the U. S. District Court for Baltimore, Maryland, in another action wherein a statutory lienor had libeled the *City of Athens* in rem and in which the libelants herein had intervened in an effort to establish a lien against the vessel for their respective fares. In addition, to support the only effective means of execution that would be necessary in the action, proofs of Hanioti's fraudulent acts, such as transfers of property, concealment, the dummy corporate set-ups and his absconding, were made.

Final decree, with provision for body execution to issue if the decree were not satisfied, was entered on December 6, 1954 (A. 12, 13). The very next day, December 7, 1954, Hanioti, still concealed and in hiding, by new counsel moved to vacate the final decree and the order providing for body

execution. After extensive hearings, in which Hanioti's appearance was directed by the Court and during which he deliberately perjured himself, the Court denied the motions with an extensive opinion under date of February 9, 1955 (A. 5).

Hanioti noticed his appeal (A. 4) from the final decree on March 24, 1955—108 days after entry of the final decree.

Despite libelants' timely motion to dismiss (R. LXV-LXXII) the respondent's appeal and the knowledge that he had deliberately removed himself from the jurisdiction of the Court, the Court of Appeals for the Second Circuit reviewed on the respondent's appeal and reversed the District Court upon the ground that the District Court had not jurisdiction of the subject matter of the action, stating:

> "The record before us presents a maze of complications, procedural and otherwise. Of the various points raised, however, it is necessary to discuss but one, as we have concluded that there was no jurisdiction in admiralty and, there being no other *alleged* basis of federal competence, the case must be dismissed." (Emphasis supplied.)

The Court then summarized the essential allegations of libelants' causes of action for return of their respective passage moneys in the following language (A. 2):

> "It is then alleged that between November 9, 1946 and July 23, 1947, Hanioti and his alter egos 'then being hopelessly insolvent, unbeknown to any of the libelants', advertised the *City of Athens* as a common carrier of passengers for hire, that libelants paid certain sums as passage money for a voyage scheduled for July 15, 1947, and that both the voyage and the vessel were abandoned by Hanioti."

As the basis for its conclusion of no jurisdiction, the Court, however, proceeded to extract further clauses from the libel without considering the proofs in conjunction with the essential allegations and the general tenor of the libel, stating:

> "While a contract for the transportation of passengers by sea is a maritime contract and a suit for its enforcement would plainly be within the admiralty jurisdiction of the District Court, this libel sets forth no such claim, but rather is in the nature of the old common law *indebitatus assumpsit*, for moneys had and received, based upon a wrongful withholding of the moneys by respondent, on the theory that in equity and good conscience he is under a duty to pay them over to libelants."

As authority for this construction and its dismissal of the libel it cites its *Silva* v. *Bankers Comm'l Corp.*, 163 F. 2d 502, and *United Transportation & L. Co.* v. *N. Y. & Balt. T. Lines*, 185 F. 2d 386, cases.

Reasons for Allowance of the Writ

1. The Court of Appeals for the Second Circuit has rendered a decision herein which is in direct conflict with a decision of this Court, *Krauss Bros. Lumber Co.* v. *Dimon S. S. Corp.*, 290 U. S. 117; 78 L. Ed. 216, as well as a decision of the Court of Appeals for the Fourth Circuit involving the very subject matter of the instant case. That Court, sub nom. *Acker et al.* v. *The City of Athens*, 177 F. 2d 961, affirmed the District Court of Baltimore for the reasons asserted by that Court in its lengthy, scholarly opinion, sub nom *Todd Shipyards* v. *The City of Athens*, 83 Fed. Supp. 67, and in which, in denying enforceability of the libelants' claims *in rem*, that Court stated (p. 64):

> "These contracts of affreightment for passenger transportation, *although maritime contracts of which the admiralty court would have jurisdiction*, do not constitute maritime liens, * * *" (Emphasis supplied.)

In the *Krauss* case, where the situation is closely analogous to that here, the libelant brought an action both, *in rem* and *in personam*, to recover an overpayment of freight and seeking, also, to establish a maritime lien for the overpay-

ment. Upon exceptions, the District Court dismissed the libel for want of admiralty jurisdiction (52 F. 2nd 492) and the Circuit Court of Appeals reversed the decree insofar as it dismissed the libel *in personam* but affirmed so much of it as dismissed the libel *in rem*. The latter point brought the action before this Court and during the argument, it was contended by the respondent that inasmuch as the payment for excess freight was made under a mistake, the demand therefore was upon a cause of action for *money had and received* which would lie only at common-law and not in admiralty. Commenting on that argument, this Court stated (290 U. S. 124):

> "Admiralty is not concerned with the form of the action, but with the substance. Even under the common-law form of action for money had and received there could be no recovery without proof of the breach of the contract involved in demanding the payment, and the basis of recovery there, as in admiralty, is the violation of some term of the contract of affreightment, whether by failure to carry or by exaction of freight which the contract did not authorize. (Citations.)"

2. Important questions relating to the scope of admiralty jurisdiction and its exercise are in issue:

Assuming, arguendo, that the nature of libelants' actions are as construed by the Court of Appeals and that the yardstick used by it in arriving at such construction was proper, if a shipowner can sue in admiralty for freights due to him then the payor of the freights or passage money should have the reciprocal right to sue in admiralty for the recovery of his prepaid, unearned, freights which the shipowner is obliged to refund to him. Otherwise, the oft waved banner of "equality under the law" or "equal application of the law" becomes a mere fictional expression. Thus, long ago in the *Moses Taylor*, 71 U. S. 411; 18 L. Ed. 397, this Court held that:

"There is no distinction in principle between a contract of this character (passenger affreightments) and a contract for the carriage of merchandise. The same liability attaches upon their execution both to owner and the ship. The passage money in one case is equivalent to the freight in the other. A breach of either contract is the appropriate subject of admiralty jurisdiction."

A factually pointed case where the passenger paid his fare and did not receive the transportation was *The Eugene*; D. C. Wash., 83 Fed. 222, also id. 9 Circ. 87 Fed. 1001. But there, like the libelants herein intervening in the *in rem* action in Baltimore, the question turned on whether the passenger had a maritime lien so that he could enforce his claim for refund *in rem*. And, in *The Guardian*, 89 Fed. 998 (D. C. Wash.), it was held that admiralty had jurisdiction *in personam* for the recovery of the amounts paid for passage when the contract is breached.

A situation, analogous to the case at Bar, except that shippers of cargo rather than passengers were involved, is *The Henry W. Breyer*, 17 F. 2nd 423 (D. C. Md.), in which the shipowner was likewise insolvent at the time he was soliciting the cargos and receiving the prepaid freights. The Court there held that the shippers' actions for recovery of the unearned, prepaid, freights were both, in contract and tort, and within the admiralty jurisdiction. Extensive and sound reasoning is set forth in the *Breyer* case which easy happened to be cited by Judge Hand in the *Silva* case, *supra*.

But the *Silva* case, cited by the present Court of Appeals in the instant case as authority, is distinguishable. There, the shipper sued an *assignee* on the law side of the Court. The shipowner had assigned the unearned freights to the assignee and the assignee took them with full knowledge of the shipowner's insolvency and that they were unearned while it also actually controlled the movements of the vessel. The theory of recovery and of the action was that of a constructive trustee. Nor, is *United Transp. & L. Co.* v.

N. Y. & Balt. T. Line, supra, cited by the Court of Appeals, apposite. There in an action in admiralty to recover payment for lighterage services rendered, the respondent interposed a counter-claim, or set-off, for an overpayment allegedly made upon some other and previous contract which overpayment resulted from the fraud of an individual who was an officer of both, libelant and respondent corporations, litigants in the action. There, the fraud had nothing to do with the contract that was the subject of the suit but concerned an entirely separate contract and transaction. The Court dismissed the counter-claim as not within admiralty's jurisdiction because it was not the type of counter-claim which could be set up as a breach of a maritime contract in a separate suit and which breach would be the key to the resulting damages or overpayment.

On the other hand, a recent decision by the U. S. Court of Claims, *Isthmian Steamship Co.* v. *The United States*, 130 F. Supp. 336 dismissed an alleged common-law action for the recovery of freights by a shipowner, holding:

> "A suit by the owner of a vessel for freight money is a suit on a maritime contract. The fact that defendant admits liability does not change the character of the action from a maritime one to a common-law one; *plaintiff's claim is still for freight, which is a maritime cause of action.*" (Emphasis supplied.)

"Freight", the consideration for a vessel's services, has always been a subject matter clearly within admiralty's jurisdiction. Whether the instant action be characterized, in form, as one for "money had and received" pursuant to a maritime contract, or one for damages measured by the amounts paid and resulting from the breach by failing to transport or, as one for damages to the extent of the sums paid, arising from the breach of the duty to refund which is annexed to the contracts of carriage by law, simple logic dictates that the duties are as maritime as the contracts themselves. Under the contracts of carriage the passengers had the duty to prepay their fares while the respondent

had the duty of transporting those who had done so or to provide substitute transportation. For failure to perform, the shipowner was obliged to refund the unearned fares. The fares—or "freights"—were maritime, the contracts were maritime, the shipowner's duty to transport was maritime, the failure to transport is a breach of a maritime contract, and the duty to refund is just as maritime as the freights and the contracts.

A century ago, in *Cobb* v. *Howard*, 5 Fed. Cas. 2925, affirmed by the 2nd C.C.A. in 5 Fed. Cas. 2924, it was held that the duties connected with passenger contracts for marine transportation were as maritime as the contracts themselves and that the causes of action by the passengers therein for the recovery of the passage moneys "had and received" by the defaulting carrier were as maritime as the contracts and clearly within admiralty's jurisdiction. See also: *The Pacific*, Fed. Cas. No. 10643, cited therein.

3. The fact that the shipowner is actually insolvent at the time of procuring the passage monies and issuing the contracts and thereby is constructively guilty of fraud, as a matter of law, does not destroy the maritime nature of the action or limit the remedy to a common-law action. Neither does the conversion of the freights destroy the maritime nature of the action. Those allegations and proofs were ancillary to the main causes of action and clearly necessary to support the prayer for coercive relief as well as the foreign attachment, which are simply equitable powers with which admiralty is clothed once acquiring jurisdiction. *Swift & Company Packers, et al.* v. *Compania Colombiana Del Caribe, S.A.*, 339 U. S. 684, 1950 A.M.C. 1089.

If the Court of Appeals be correct in the narrow construction it accords to the action, viz: "money had and received" this Court has never passed upon the point as to whether an action would lie in admiralty for the recovery of moneys had and received pursuant to a maritime contract, except as previously pointed out in the *Krauss* case.

supra. Commentators have thought, however, that if any doubts existed as to admiralty's jurisdiction over such actions, they were dispelled by the *Krauss* case. 47 Harv. L. Rev. 519, 520; 34 Col. L. Rev. 358, 359. Thus, if the freights of the passengers were still intact in the respondent's hands upon the institution of suit, under the decision of the Court of Appeals, though they are a subject matter for admiralty insofar as a shipowner is concerned, the District Court would not have admiralty jurisdiction for their recovery by the libelants. On the other hand, this Court in the *Eclipse*, 135 U. S. 599, 608, which it cites in the *Swift* case, *supra*, states:

> "The jurisdiction embraces all maritime contracts, torts, injuries or offenses, and it depends, in cases of contract, upon the nature of the contract, and is limited to contracts, claims and services purely maritime, and touching rights and duties appertaining to commerce and navigation."

Equal application of the law, or equality under the law, requires that if a shipowner can sue in admiralty for freights due to him for performance of a maritime contract, then the shippers or passengers have the reciprocal right of suing in admiralty for the recovery of freights "had and received" by a shipowner who breaches his maritime contract by failing to perform the contract, or by failing to refund upon demand following the breach. The rights, duties and liabilities of each are as maritime as the contracts and freights and within the admiralty jurisdiction.

4. In failing to construe the libel in the light of the proofs, the Court below ignored 28 U. S. C. 2111 which required it to allow amendment of any technically defective allegations.

The yardstick of review by the Court of Appeals in this admiralty action was not only contrary to decisions of this Court but contrary to its own decisions. In the *Syracuse*, 79 U. S. 382, on this very point this Court has stated:

> "... in admiralty, an omission to state facts which prove to be material but which cannot have occasioned any surprise to the opposite party, will not be allowed to work any injury to the libelant, if the Court can see there was no design on his part in omitting to state them." (Citations.)
>
> There is no doctrine of mere technical variance in admiralty, and subject to the rule above stated, *it is the duty of the Court to extract the real case from the whole record, and decide accordingly.*" (Emphasis supplied.)

Without regard to the mandate of 28 U. S. C. A. 2111, as its opinion reveals, the Court of Appeals did not examine into the record or proofs, which clearly showed admiralty jurisdiction, but confined itself to analyzing only the libel. The very opening of the libel (A. 14) distinctly and affirmatively alleges pursuant to Adm. Rule 22

> "in causes of *contract*, civil and maritime" (emphasis supplied)

and concludes with the final prayer (A. 17)

> "that this honorable Court may be pleased to grant its decree or decrees for the respective damages of each of the libelants herein, with costs and such other and further relief as in law and justice they may be entitled to receive."

Moreover, the Court's summary of the libel, quoted *supra* p. 7, contains the essentials of a maritime cause of action.

The strained, prejudicial construction placed upon the libel could only arise by virtue of its application of principles of construction of pleadings akin to the narrow New York Civil Practice Act and Rules and its failure to heed the liberal admiralty rule, and 28 U. S. C. A. 2111.

It has long been the admiralty rule (recently adopted on the law side of the Federal Court) that if upon the facts established the libelants can recover upon any proposition of law within the admiralty scope of jurisdiction, the libel

must be sustained. In *Dupont v. Vance*, 60 U. S. 584, 587, this Court has held that:

> "* * * there are no technical rules of variance, or departure in pleading, like those in the common law, *nor is the Court precluded from granting the relief appropriate to the case appearing on the record, and prayed for by the libel*, because that entire case is not *distinctly* stated in the libel. * * * The Court decrees *upon the whole matter* before it." (Emphasis supplied.)

Nor does some inaccuracy in the statement of subordinate facts or of the legal effect of the facts propounded preclude the Court from awarding any relief, which the law applicable to the whole case warrants. *The Gazelle*, 128 U. S. 496.

In *Dampskibs Aktiesselkabet Thor* v. *Tropical Fruit Co.*, 281 Fed. 740, 742, the same Circuit (different judges) cited the doctrine enunciated by it in its *Volunteer* case, 149 Fed. 723, to wit:

> "* * * that it is the practice in Admiralty to bring all parties before the Court, and to determine the controversy on the merits as it appears from the proofs *regardless of the technicalities of pleadings*—always assuming (as may be done here) that no party is surprised or injured by that equitable proceeding." (Emphasis supplied.)

The proofs showed the dates of payments by the libelants, their scheduled voyages and itineraries, the issuance of passage contracts to them, the abandonment of the vessel and voyages by the respondent, the demands for refund of their respective passage moneys by the libelants and the failure to make any refunds to them. The proofs aforesaid were by sworn admissions of the respondent and his general passenger agent for the vessel. The damages sought by the respective libelants, as the libel indicates, is measured by the amounts paid for passage respectively. While they were entitled to sue for additional damages such as coming

to New York, putting up in hotels, etc. anticipating departure of the vessel (Cf. *The Normania* (S. D. N. Y.) 62 Fed. 469), they were deliberately not included because of the impracticability of proving each passenger's additional damage for the reason that they are scattered throughout the world and the costs of proving such incidental damages would far exceed those damages.

The subordinate allegations of fraud and concealment were likewise established by admissions under oath of the respondent and were absolutely requisite under the circumstances attendant to the case and the respondent, for, without some coercive relief a decree of the District Court, or any court for that matter, would not be worth the paper upon which it was printed.

The Court of Appeals, unfortunately, blended the subordinate allegations into the causes upon the contracts. Upon the facts established (which the Court of Appeals did not consider or use in its yardstick of review) clearly the decree is sustainable upon the theory of breach of a maritime contract—the failure to perform the transportation service.

But if the only cause of action, upon the facts coupled with the allegations in the libel, be that for money had and received pursuant to a maritime contract for transportation, then the decision of the Court of Appeals is novel and is a curtailment of admiralty's traditional jurisdiction. See: *U. S. Fleet Corp.* v. *Banque*, (3rd Circ.) 286 Fed. 918; *The Oregon*, (6th Circ.) 55 Fed. 666, 667; *Talsumma K.K.K.* v. *Rob't Dollar Co.*, (9th Circ.) 31 F. 2nd 401.

Every payor of money to a shipowner as consideration for the performance of a marine contract, whether it be for transportation, towage, operations or any marine services, would pay at his own peril. The recipient would have the benefits and privileges of admiralty's jurisdiction, but the payors would be relegated to the confusion and technical obstacles of the common-law courts, as they exist, dependent upon their particular geographical locations.

Such a result, if the Court of Appeals curtailment of admiralty's jurisdiction as indicated in its decision is permitted to stand, would seem contrary to the Constitutional grant of judicial power "to *all* cases of admiralty and maritime jurisdiction." *U. S. Const. Art. III, sec. 2.*

5. The action of the Court of Appeals in reviewing and reversing the District Court constitutes a serious question as to whether it could acquire appellate jurisdiction by a notice of appeal from a final decree in admiralty taken 108 days after its entry when the time within which the appeal must be taken had not been extended by the District Court as required by 28 U. S. C. 2107.

CONCLUSION

For all of the above reasons, a writ of certiorari, as prayed for, should be granted.

Respectfully submitted,

HARRY D. GRAHAM,
Counsel for Petitioners,
76 Beaver Street,
New York, N. Y.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 351

R. V. ARCHAWSKI, et al.,

Petitioners,

v.

BASIL HANIOTI, etc.,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

HARRY D. GRAHAM,
Counsel for Petitioners,
76 Beaver Street,
New York 5, N. Y.

INDEX TO APPENDIX

Opinion of United States Court of Appeals. Second Circuit. 1

(Record pages 1399 to 1402)

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 319 October Term, 1954

Argued April 20 and 21, 1955 Decided June 3, 1955

Docket No. 23566

R. V. Archawski, et al.,
Libellants-Appellees, 2

against

Bash. Haxioti, etc., et al.,
Respondents,

Bash. Haxioti, etc.,
Respondent-Appellant.

Before: Frank, Medina and Hincks, *Circuit Judges.*

Defendant appeals from a judgment and decree of the United States District Court for the Southern District of New York, which contains a direction that a writ of attachment against the person of defendant shall issue for its 3
enforcement. In admiralty. Lawrence E. Walsh, Judge. Opinion below reported 129 F. Supp. 410. Reversed and remanded.

Harry D. Graham, New York City, New York, for libellants-appellees.

Leonard Aitschul, New York City, New York, (Samuel Bader, New York City, New York, of Counsel), for respondent-appellant.

MEDINA, *Circuit Judge*:

The record before us presents a maze of complications, procedural and otherwise. Of the various points raised, however, it is necessary to discuss but one, as we have concluded that there was no jurisdiction in admiralty and, there being no other alleged basis of federal competence, the case must be dismissed.

The libel, by several hundred prospective passengers on the "City of Athens", a vessel of Honduran registry, names as respondent Basil Hanioti, and he is sued "individually, and doing business as Sociedad Naviera Transatlantica, 5 S.A., Compania De Vapores, Mediterranea, American Mediterranean Steamship Line, Ltd., American Mediterranean S/S Agency, Inc., and Basile Shipping Company, Inc.," it being alleged that the concerns whose names are thus set forth are "ostensible firm names," in fact mere "alter egos" of Hanioti, who is accordingly described as the owner of and in control of the "City of Athens." The use of these alter egos or "mere shams" is alleged to be part of "a designed plan for the purpose of shielding himself from possible liability for the fraudulent acts hereinafter stated and by virtue of which the respective libellants have each been damaged."

It is then alleged that between November 9, 1946, and 6 July 23, 1947, Hanioti and his alter egos "then being hopelessly insolvent, unbeknown to any of the libellants," advertised the "City of Athens" as a common carrier of passengers for hire, that libellants paid certain sums as passage money for a voyage scheduled for July 15, 1947, and that both the voyage and the vessel were abandoned by Hanioti. The balance of the libel is devoted to an enumeration of various fraudulent practices said to have been resorted to by Hanioti, such as secreting himself and his

assets, maintaining "a secret residence in New York the location of which, after due diligence, cannot be found," and otherwise defrauding libellants of the moneys they had paid. The libel avers that the moneys were "collected to the respondent's account" and that they "were wrongfully and deliberately applied to his own use and benefit in reckless disregard of his obligations to refund the same."

While a contract for the transportation of passengers by sea is a maritime contract, and a suit for its enforcement would plainly be within the admiralty jurisdiction of the District Court, this libel sets forth no such claim, but rather is in the nature of the old common law *indebitatus assumpsit*, for money had and received, based upon the wrongful withholding of moneys by respondent, on the theory that in equity and good conscience he is under a duty to pay them over to libellants. *Silva v. Bankers Commercial Corporation*, 163 F. 2d 602 (C.C.A. 2, 1947); *United Transp. & L. Co. v. New York & Baltimore T. Line*, 185 Fed. 386 (C.C.A. 2, 1911). If the libel is viewed as stating some sort of a claim based upon tortious conduct in the nature of fraud, as seems to have been the intent of the pleader, the case against admiralty jurisdiction is even clearer.

Reversed and remanded to the District Court for dismissal for lack of admiralty jurisdiction.

10

Respondent's Notice of Appeal From Final Decree.

(Record page 392)

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Sirs:

PLEASE TAKE NOTICE that the respondent Basil Hanioti hereby appeals to the Court of Appeals for the Second Circuit from the final decree docketed as Judgment #59801 on January 11, 1955, in the above entitled proceeding and
11 that this appeal is from each and every part thereof.

Dated: New York, March 24, 1955.

Yours &c.,

LEONARD ALTSCHUL /s
Leonard Altschul,
Attorney for Respondent Basil Hanioti.
Office & P. O. Address,
No. 384 East 149th Street,
Borough of Bronx,
City of New York.

To:

12 HARRY D. GRAHAM, Esq.,
Attorney for Libellants,
No. 76 Beaver Street,
Borough of Manhattan,
City of New York.

CLERK OF UNITED STATES DISTRICT COURT
FOR SOUTHERN DISTRICT OF NEW YORK.

Opinion/Order of United States District Court.

(Record pages 317 to 324)

#24

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

APPEARANCES:

HARRY D. GRAHAM, Esq., Proctor for Libellants, 76 Beaver Street, New York 5, New York. 14

LEONARD ALTSCHUL, Esq. (ARCHIBALD PALMER, Esq., of Counsel), Proctor for Respondent, 384 East 149th Street, Bronx, New York.

OPINION

WALSH, *D.J.*

After a decree had been entered in favor of libellants respondent moved to vacate the decree as one entered upon a default and to vacate the order for body execution entered in connection with that decree. Both motions are denied.

The trial of this action was duly scheduled for November 23, 1954. On that date the attorneys of record for the respondent Hanioti appeared before the court, stating they had been unable to get in touch with their client, had no idea where he could be reached, and did not know when or if he would return. They conceded that he was already in default in appearing for oral examination although an order directing his appearance had been made from the bench by Judge Sugarman, and it is uncontradicted that he was in default on three other occasions in connection 15

with this matter. They were unprepared to offer any defense. The attorney for the libellants submitted his proof and a decree was granted in their favor. On December 6th the decree was formalized and signed by the Court embodying the judgment and authorizing the issuance of execution against the person of Hanioti.

Thereafter, on December 7th, respondent Hanioti first manifested an interest in these proceedings. By a show cause order he moved to vacate the decree and to enjoin its enforcement by body execution. His explanation for his failure to cooperate with his attorneys on November 23rd was that he had had a falling out with them as long
17 ago as December, 1953, that he had discharged them, that they had refused to represent him, that they refused to turn over papers in their possession pertaining to his various law suits to his present attorney (who was not of record in this case), and refused to give him any information as to the date of trial in the present action.

However, his own affidavit belies these excuses as well as his claim made in court by one of his present attorneys, that he had been under the impression that the present action was dismissed by Judge Ryan in 1952. His affidavit asserts that on November 9th his attorneys of record notified his business associate, through whom he customarily received communications, one Stathos, that the trial date was approaching and that they would not represent
18 him. This message was relayed to him. Even if it is true, as he claims, that at that time they told Stathos the trial date was the first week in December, it does not excuse his failure to ascertain the exact and correct date independently, considering the alleged nature of his relations with these attorneys, nor his failure to take those steps which any reasonable litigant, with bona fide intentions of defending a suit for over $130,000, would take under similar circumstances in the belief that the date of trial

was less than one month distant. There is no basis for believing that any other attorney represented him at the date of trial. He did not ask his present attorney, Mr. Altschul, to represent him until after its conclusion. He took no steps to notify the court of any substitution of attorneys until even later.

These facts, his testimony under oath before me, and the record of his testimony before Judge Ryan, convince me that the default, if it may so be called, was wilful and that the respondent is an unbelievable scoundrel, indifferent to money judgments against him because he believes himself judgment proof under the ordinary methods of execution. The motion to vacate the decree is accordingly 20
denied.

The only question remaining is whether body execution is appropriate in this case. Libellants' action is based on the breach of a contract of affreightment. In 1947 they paid for passage from New York to various European ports or back aboard a vessel known as City of Athens. The voyages, scheduled for July 15, 1947 and thereafter, never took place, because, prior to that date, the vessel was libelled by various creditors and sold. The passage money was never refunded although there is no doubt that under the terms of the contract itself and under the controlling decisions, the passengers were entitled to recover in admiralty from the ship owner. *The Moses Taylor*, 71 U. S. 411, 427; *The Aberfoyle*, Fed. Cas. No. 16, aff'd. Fed. Cas. 21
No. 17; *Foster* v. *Compagnie Francaise de Nav. A. Vapeur*, E. D. N. Y., 237 F. 858; *Benedict on Admiralty* (6th Ed.), Vol. I, § 61.

The nominal owner of the ship was a Panamanian corporation, Sociedad Naviera Transatlantica, S.A. This vessel was substantially its only asset. *City of Athens*, 1949 A. M. C. 572, 576. The corporation kept "some sort of books".

It kept no separate bank account. It, as well as other ship-owning corporations set up and managed by Hanioti along the same lines, were, by his own admission, "mere paper companies". Their assets were freely intermingled because it was "immaterial" to Hanioti in what name checks were made out or received. They were all one group, under the control of Hanioti.

It is an elementary proposition of law that where the corporate form is used merely as an alter ego, or business conduit of a person, it may be disregarded to prevent fraud. *Fletcher Cyc. Corps.* (Perm. Ed.), Vol. 1, §§ 41, 44 and 46 and cases there cited; *A. B. Dick* v. *Marr*, S. D.
23 N. Y., 48 F. Supp. 775, 776, aff'd. 2 Cir. 155 F. 2d 923; *In Re V. Loewer's Cambrinus Brewery Co.*, S. D. N. Y., 74 F. Supp. 909, 913, aff'd. 2 Cir. 167 F. 2d 318; *Hollander* v. *Henry*, 2 Cir. 186 F. 2d 582; *African Metals Corp.* v. *Bullowa*, 288 N. Y. 78, 85, 41 N. E. 2d 466; *S. F. S. Realty Co., Inc.* v. *George M. Adrian & Co.*, 285 N. Y. S. 1018, 159 Misc. 26. On the facts in this case it is clear that the libellants were entitled to recover in admiralty from respondent Hanioti personally, as the ship owner, on the maritime contract.

Admiralty Rules 3 and 20 point to State procedures for enforcement of admiralty decrees. New York Civil Practice Act, Sections 764 and 826, provides for execution against the person in certain types of actions. Section 826(9)
24 provides for arrest:

> "In an action upon contract, express or implied, where it is alleged in the complaint that the defendant was guilty of fraud in contracting or incurring the liability, or that, since the making of the contract, or in contemplation of making the same, he has removed or disposed of his property with intent to defraud his creditors, or is about to remove or dispose of the same

with like intent; but where such allegation is made, the plaintiff cannot recover unless he proves the fraud on the trial of the action: * * *"

The New York cases hold that a representation of solvency or concealment of insolvency by a purchaser when buying goods on credit, coupled with an intent not to pay for them is fraudulent. It is enough to authorize arrest under this subdivision. *Wright* v. *Brown*, 67 N. Y. 1; *Tannenbaum* v. *Reich*, 2 N. Y. S. 734; Cf. *Norris* v. *Talcott*, 96 N. Y. 100; *Hotchkin* v. *Third Nat. Bk. of Malone*, 127 N. Y. 329, 344; and see *Anonymous*, 67 N. Y. 598. There is no difference between buying goods with the intent not to pay for them and taking unearned moneys with the intent not to perform the services. *The Henry W. Breyer*, 1927 A. M. C. 290, 303; and see *Lehrer* v. *Nusbaum*, 233 N. Y. S. 340, 133 Misc. 710. 26

There is sufficient evidence in the record before the Court to justify the inference not only that respondent was insolvent; knew he was insolvent, but also that he took this money with the intent not to perform.

A. Respondent was insolvent:

In the proceeding in Baltimore creditors' claims of $775,457.82 were allowed. Only $400,000 was realized from the sale of the ship, the corporation's only asset; and less than $401,837.71 was available for distribution. Insolvency may be inferred from the fact that shortly after the purchase judgments were entered against the purchaser grossly in excess of the amount realized from his property. *Tannenbaum* v. *Reich*, 2 N. Y. S. 731. 27

B. Respondent knew he was insolvent:

Hanioti, in the Baltimore proceeding, admitted that prior to the filing of the libel in the Baltimore pro-

ceeding, he knew the corporate owner was in a precarious position and had practically no funds.

C. Respondent intended not to perform:

1. Not only did he accept passage money right up until the libel was filed, but the record shows he continued to receive it even after the filing of the libel and the attachment of the vessel by his creditors.

2. At no time was the vessel supplied or provisioned to make the scheduled July 15th voyage.

29 3. There were no funds in any of Hanioti's various coffers to provide such supplies and provisions. Hanioti's account with the ticket agent was virtually empty. The Court found no assets belonging to the Sociedad except the vessel. *City of Athens,* 1949 A. M. C. 572, 576. According to Hanioti's own testimony before Judge Ryan, referred to by both parties in connection with this motion, the Compania De Vapores, through whose accounts most of the disbursements for the ship owning corporation were made, also "collapsed" along with his other companies in 1947.

These facts are sufficient to satisfy the Court that Hanioti accepted the passage money, most of which was received within a month of the promised voyage, with the knowledge 30 that the vessel could not make the July crossing and with the intention of defrauding the libellants.

The action is on the contract, thus within the admiralty jurisdiction of the Court. The libel alleges fraud in the contracting of the agreement which was broken. This fraud has been established to my satisfaction. Under the New York statutes this is enough to sustain a body execution.

The libellants are also entitled to body execution on the further ground that Hanioti disposed of or removed his property with intent to defraud. By his own admission he had the unqualified power to dispose of the funds paid to his ticket agent by the libellants. In New York, it has been held that such funds, paid for passage on ships for voyages which were not undertaken form constructive trust funds for the benefit of the prospective passengers. *Ieffer* v. *Hanioti*, 92 N. Y. S. 2d 914, 276 App. Div. 78. No satisfactory explanation was ever made as to their whereabouts. Like the District Court for the district of Maryland, I disbelieve his testimony that they had been ultimately paid over to Todd. Even if they were, in view of his financial circumstances, he had no right to use them to pay an old debt unrelated to the voyage in question. His diversion of these moneys to the Vapores account where they were mingled with funds which had been paid to his other companies and out of which they could not be traced, and his failure to keep separate records and accounts for the Sociedad, constituted a disposal with intent to defraud.

Motions to vacate the decree and the order for body execution contained therein are denied. Costs to libellants. It is so ordered.

LAWRENCE E. WALSH,
United States District Judge.

Dated: February 9, 1953.

34

Final Decree.

(Record pages 293 and 294)

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

This cause having duly come on to be heard in regular order on November 23, 1954, upon all prior proceedings, the pleadings and the proofs and having been argued and submitted by Harry D. Graham, Esq., proctor in behalf
35 of libellants, and Frank H. Cooper & Frank Delaney, proctors in behalf of respondent, by Frank H. Cooper, Esq., advocate, the Court, after due deliberation, having found the allegations contained in the libel to be amply supported upon the record and that the passage monies procured from the libellants by the respondent, and those for whom he is responsible, in consideration of contracts for passage upon the steamship "City of Athens" were fraudulently procured; that such passage monies were unearned and, as such, constituted constructive trust funds and, upon abandonment of the vessel and her scheduled voyages for which the libellant/passengers were booked, such passenger monies were refundable to the libellants and though payment thereof by the libellants was duly demanded, the
36 respondent refused to make such repayment and actually had converted said funds to this own use and the use of those for whom he is responsible and the Court, further, having directed a decree to be entered in favor of the libellants with costs, heretofore taxed in the sum of $35.00,

Now, on motion of Harry D. Graham, Esq., proctor for the libellants, it is

37

ORDERED, ADJUDGED AND DECREED, that the libellants recover of the respondent, Basil Hanioti, their respective passage monies as scheduled in the libel, aggregating the sum of $130,383.69, and costs as taxed at $35.00, and said respondent, Basil Hanioti, is hereby directed to pay said sum of $130,383.69 and costs in sum of $35.00, making in all the total sum of $130,418.69, with interest thereon at 6% from the 23rd day of July, 1947, until paid, to the libellants through their proctor, Harry D. Graham, Esq., for distribution amongst them together with their costs as taxed;

38.

FURTHER ORDERED, ADJUDGED AND DECREED, that unless this decree be satisfied within ten days from the date of service of a copy hereof, with notice of entry, upon the respondent's proctors herein, or unless execution upon this decree be stayed by an appeal with proper and approved security thereon during said ten-day period, the Clerk of the Court is directed to issue to the United States Marshal a writ of attachment against the person of said Basil Hanioti to compel him to perform and obey this decree.

Dated, New York, N. Y., December 6, 1954.

LAWRENCE E. WALSH,
United States District Judge.

A TRUE COPY

39

WILLIAM V. CONNELL, Clerk
By EUGENE LIEBER
Deputy Clerk

(SEAL)

40

Libel.

(Record pages 245 to 250)

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The libels and complaints of R. V. Archawski, Mrs. R. Acker, P. Agresti et al. (list of libellants continues), individually and severally,

against

41

Basil Hanioti, individually, and doing business as Sociedad Naviera Transatlantica, S. A., Compania de Vapores, Mediterranea, American Mediterranean Steamship Line, Ltd., American Mediterranean S/S Agency, Inc., and Basile Shipping Company, Inc., in causes of contract, civil and maritime, respectfully shows and alleges, upon information and belief:

First: That at all of the times hereinafter mentioned and as set forth in libellants' annexed Exhibit I, the

42 respondent, Basil Hanioti, doing business under his own name and as Sociedad Naviera Transatlantica, S.A., Compania de Vapores Mediterranea, American Mediterranean Steamship Line, Ltd. and American Mediterranean Steamship Agency, Inc., maintained his principal office and place of business at 44 Whitehall St., City of New York, owned and controlled a certain passenger vessel known as the "City of Athens" of Honduran registry

SECOND: That the aforesaid ostensible firmnames, under which the respondent operated, were in fact his alter egos and mere shams created by him and used by him to further a designed plan for the purpose of shielding himself from possible liability for the fraudulent acts hereinafter stated and by virtue of which the respective libellants have each been damaged.

THIRD: Between November 9th, 1946 and July 23rd, 1947, the respondent and his alter egos then being hopelessly insolvent, unbeknown to any of the libellants, advertised and held out the steamer "City of Athens" as a common-carrier of passengers for hire. 44

FOURTH: On the respective dates set forth beside their names in the attached exhibit 1, the libellants paid the respective sums set forth beside their names for passage upon said vessel, as scheduled, commencing with an advertised and scheduled voyage for July 15th, 1947 and thereafter.

FIFTH: On or about the 24th day of July, 1947, through his alter egos, Hanioti, the respondent, notified the passenger-libellants herein of his abandonment of the voyages scheduled and fled the United States to Europe, abandoning the vessel also.

SIXTH: That the aforesaid sums paid by the libellants 45 were collected to the respondent's account and, though unearned passage monies, were wrongfully and deliberately applied to his own use and benefit in reckless disregard of his obligations to refund the same and, though refunds were duly demanded he has refused to pay the same and has secreted himself away and manipulated his assets as hereinafter set forth for the purpose of defrauding the libellants.

SEVENTH: That respondent is now the owner of two vessels known as the "Basile" and the "Carmen", the latter of which is presently in the port of New York and within the jurisdiction of this Court, and said respondent is presently conducting business under the name of "Basile Shipping Company, Inc." although after diligent efforts no office for such ostensible firm, which in fact is his alter ego, can be found.

EIGHTH: That said "Basile Shipping Company, Inc." was created by the respondent for, and as, an attempt to shield himself from liability and satisfaction of any decrees
47 that may be issued against him in connection with his manipulations and operations aforementioned, and is in fact a fraud and a sham and a mere dummy within his control.

NINTH: That in addition to the aforesaid fraudulent acts of the respondent, he committed other transactions, made conveyances, assignments and other manipulations with the intent to deceive and in fraud of the libellants.

TENTH: That during the pendency of process herein, the respondent has, or will have, goods, assets, credits, chattels, effects and monies to his account, or to the account of his alter ego, Basile Shipping Company, Inc., in the hands and control of Sieling & Jarvis of 50 Broadway,
48 Borough of Manhattan.

ELEVENTH: Respondent maintains a secret residence in New York the location of which, after due diligence, cannot be found.

TWELFTH: That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Court.

THIRTEENTH: That the refusal of the respondent, and those for whom he is responsible, to refund or return the respective unearned passage monies paid by the libellants has damaged each of the libellants in the respective sums set forth beside their names in the annexed exhibit No. 1 which is made part of this libel.

WHEREFORE, libellants pray that a citation in due form of law, according to the course of this honorable Court in cases of admiralty and maritime jurisdiction, may issue against the respondent Basil Hanioti and each of the respondents hereinabove named and that he may be required to appear and answer under oath this libel, and all and singular the matters aforesaid and if he cannot be found that the goods, chattels and, if none can be found, that the credits and effects to the respondents or Basile Shipping Company, Inc. account in the hands and custody of Sieling & Jarvis of 50 Broadway, New York City, including respondent's vessel s/s Carmen, may be attached to the sum of $130,632.79, that being the aggregate of the respective libellant's damages, with costs, and that said Sieling & Jarvis may be cited to appear and answer on oath as to the credits and effects in their hands and custody belonging to, and to the account of said Basile Hanioti or Basile Shipping Company, Inc. and that this honorable Court may be pleased to grant its decree or decrees for the respective damages of each of the libellants herein, with costs and such other and further relief as in law and justice they may be entitled to receive.

Sept. 16, 1952.

HARRY D. GRAHAM,
Proctor for Libellants,
76 Beaver Street,
New York 5, N. Y.

52

Exhibit I Annexed to Libel.

LIBELLANTS' SCHEDULE

Name	*Ticket No.*	*Fare Paid*	*Itinerary*	*Date Paid*
R. V. Archawski	814, 815, 816, 817 & 818	$3108.00	Mars/NY	6/17/47
Acker, Mrs. R.	460	249.10	Naples/NY	4/27/47
Agresti, P.	861 / 862	616.00	Naples/NY	6/26/47
	Total	$130,383.69		

53

et al., (libellants' schedules continue)

(Verification of Libel, Sept. 16, 1952)

54

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 351

R. V. ARCHAWSKI, ET AL.,

Petitioners,

v.

BASIL HANIOTI, ETC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' BRIEF

HARRY D. GRAHAM,
Counsel for Petitioners,
76 Beaver Street,
New York 5, N. Y.

INDEX

TABLE OF CASES CITED

STATUTES CITED

OTHER AUTHORITIES

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PETITIONERS' BRIEF

Opinions Below

The opinion of the United States District Court for the Southern District of New York (T. 5-11; R. 317-324; Walsh, D.J.) is reported in 129 Fed. Supp. 410.

The opinion of the United States Court of Appeals for the Second Circuit (T. 1-3; Frank, Medina and Hincks, C.J.J., opinion by Medina, C.J.) is reported in 233 F. 2nd 406.

R. refers to the pages of the certified original record of the proceedings below on file in this Court.

T. refers to the pages of the printed Transcript of Record on file in this Court.

Jurisdiction

The decision and judgment of the United States Court of Appeals for the Second Circuit was entered on June 3, 1955.

Petition for the grant of a writ of certiorari was filed on August 26, 1955.

Writ of certiorari was granted on October 24, 1955.

Jurisdiction of this Court is found in Title 28, U. S. Code, Secs. 1254(1), 2101(c) and 2106.

Constitutional Provision and Statutes Involved

"U. S. Const., Art. III, Sec. 2—The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and citizens of another State;—between citizens of different States;—between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

"28 U. S. C. A. 2111. On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

"28 U. S. C. A. Supreme Court Admiralty Rule 2. In suits in personam the process shall be by a simple monition in the nature of a summons to appear and answer the suit, or by simple warrant of arrest of the person of the respondent in the nature of a

capias, as the libelant may, in his libel or information pray for or elect; in either case with a clause therein to attach his goods and chattels, or credits and effects in the hands of the garnishees named in the libel to the amount sued for, if said respondent shall not be found within the district. But no warrant of arrest of the person of the respondent shall issue unless by special order of the court, on proof of the propriety thereof by affidavit or otherwise."

"28 U. S. C. A. *Supreme Court Admiralty Rule 22.* All libels in instant causes, civil and maritime, shall be on oath or solemn affirmation and shall state the nature of the case, as, for example, that it is a cause civil and maritime, of contract, or a tort or damage, or of salvage, or of possession, or otherwise, as the same may be; and, if the libel be in rem that the property is within the district; and, if in personam, the names and places of residence of the parties so far known. The libel shall also propound and allege in distinct articles the various allegations of fact upon which the libelant relies in support of his suit so, that the respondent or claimant may be enabled to answer distinctly and separately the several matters contained in each article; and it shall conclude with a prayer for due process to enforce his rights in rem, or in personam, as the case may be, and for such relief and redress as the court is competent to give in the premises."

"28 U. S. C. A. 2107. Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed within thirty days after entry of such judgment, order or decree.

In such action, suit or proceeding in which the United States or any officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.

In any action, suit or proceeding in admiralty, the notice of appeal shall be filed within ninety days after the entry of the order, judgment or decree appealed from, if it is a final decision, and within fifteen days after its entry if it is an interlocutory decree.

Statement of the Case

On September 16, 1952, in the United States District Court for the Southern District of New York, a libel (T. 14-18; R. 245-250) in personam was filed in the individual behalves of some 350 cold libelants against the respondent Basil Hanioti, individually, and doing business under various pseudonyms, seeking damages measured by the amounts of the respective passage moneys which each had paid for prospective voyages on the respondent's vessel, "City of Athens," which voyages were never performed, nor substitute transportation provided, nor the passage moneys refunded, though duly demanded.

For the purpose of obtaining an order of body attachment upon the grounds of fraud, absence from the jurisdiction, and concealment, the essential allegations respecting the breaches of the maritime contracts of transportation were supplemented by factual allegations showing that at all of the times that the respondent was advertising and holding out the "City of Athens" to the public as a common carrier of passengers for hire, he and his alter egos were, unbeknownst to the libelants, hopelessly insolvent and that on July 24, 1947, he abandoned the vessel and projected voyages and fled the United States to Europe; that he had converted the unearned passage monies and had secreted himself away, and so manipulated his assets as to make himself judgment proof under normal procedures for the purpose of defrauding the libelants and was, at the time of filing the libel, shielding himself behind another dummy corporation which was his alter ego.

Process was prayed with the further request that if Hanioti could not be found that goods and chattels to the credit of his alter ego, "Basile Shipping Company, Inc.," and particularly the vessel known as the "Athens" then in New York, be attached. The "Athens" was thereupon attached by the U. S. Marshal and Hanioti appeared by

counsel and, under oath, answered the libel generally denying the allegations (R. 285-288). Thereafter a series of defaults on his part ensued, to the extent of wilfully disregarding peremptory orders from the Bench and a refusal on his part to co-operate with his proctors of record (T. 5).

Some two years later, November 23, 1954, the action duly came to trial and Hanioti defaulted in personally appearing but was represented by his proctors of record (T. 5). Libelants put in their proofs consisting, inter alia, of Hanioti's sworn testimony (Lib. Ex. 2; R. 193, 194) and his general passenger agent's sworn testimony (Lib. Ex. 1; R. 193, 194) taken before the United States District Court for Baltimore, Maryland, in another action wherein a statutory lienor had libeled the "CITY OF ATHENS" In Rem and in which the petitioners had intervened in a vain effort, and hopes, that they would be granted a maritime lien against the vessel for their respective fares.

In addition, to support the only effective means of execution that would be necessary in the action, proofs of Hanioti's fraudulent acts such as transfers of property, concealment, the dummy corporate set-ups, and his absconding were made. The Court (Walsh, D.J.) directed a decree for the libelants which (T. 12-13) was formalized and entered on December 6, 1954 and in which the District Court found the allegations of the libel to be amply supported upon the record.

With respect to execution of its decree by body attachment of Hanioti, unless he satisfied the same, the District Court found (T. 7-11) that the subordinate allegations in the libel, respecting Hanioti's fraudulent acts, dummy corporations, absconding, etc. were amply supported upon the record which it diligently points out in its opinion findings (T. 5-11).

The very next day following entry of the final decree, December 7, 1954, still in concealment and by new counsel, Hanioti moved to vacate the final decree and the [illegible]

therein providing for body execution (T. 5; R. 299-315a). After extensive hearings, in which Hanioti's personal appearance in Court was directed by the Court (R. 338) and during which he deliberately perjured himself (R. 316), the Court denied the motions under date of February 9, 1955 (T. 5).

Hanioti, still in concealment and frustrating the U. S. Marshal in the execution of the process of the District Court, noticed his appeal (T. 4) from the final decree on March 24, 1955—108 days after entry of the final decree, without any extension of time within which to appeal having been granted to him and without having posted any supersedeas or security.

Despite petitioners' timely motion to dismiss the respondent's appeal (R. LXV-LXXII) and the knowledge that he had deliberately removed himself from the jurisdiction, the Court of Appeals reviewed upon the respondent's appeal reversing the District Court, on the law, and remanding the cause back to the District Court for dismissal upon the ground that admiralty lacked jurisdiction of the subject matter (233 F. 2d 406; T. 1-3), whereupon the District Court dismissed the action as ordered.

As the basis for its reversal, the Court of Appeals held that the petitioners' actions were in the nature of the old common law *indebitatus assumpsit*, for "money had and received" citing as authority for this construction and its action its *Silva v. Bankers Comm'l Corp.*, 163 F. 2nd 602 and *United Transportation & L. Co. v. N.Y. & Balt. T. Lines*, 185 Fed. 386, cases.

The facts, as found by the District Court, come to this Court undisturbed by the Court of Appeals.

With approval of this Court, as contained in its order of December 12, 1955, petitioners have designated, as those parts of the record deemed necessary for this Court's consideration of the questions presented, those portions of the

certified original record filed herein previously printed, separately bound, and now on file in this Court as "Transcript of Record."

ARGUMENT

QUESTION NO. 1

The United States District Courts, sitting in admiralty, have jurisdiction of actions seeking the recovery of passage monies prepaid as consideration under maritime contracts of carriage which are breached by nonperformance and where no substitute transportation is provided.

The founding fathers, all experienced in the law as administered during colonial days and the strife between the common-law and admiralty courts of England, who drafted the Constitution of this nation as a monument and pillar of government of free men, by free men, provided therein that the judicial power of the Federal courts,

> " " " shall extend to all Cases of admiralty and maritime jurisdiction; " " " (Art. III, Sec. 2, U. S. Const.).

Because of attacks upon this grant of judicial power seeking to limit and circumscribe it in accord with the absurd provisions of the English law, shortly after the adoption of the Constitution the Congress, in 1789, by *1 Stat. 73, Sec. 9*, rendered a legislative interpretation of the scope of the admiralty and maritime jurisdiction contemplated by the drafters. This statutory interpretation soon won the approval of the Federal Circuit courts and, in 1809, the noted decision of Mr. Justice Washington, in *Davis v. Brig Sapphire*, 21 Fed. Cas. 12,070 was handed down wherein he defined the scope of the admiralty and maritime jurisdiction as not to be determined by the absurdities of the Eng-

lish law as it existed at the time of the adoption of the Constitution, but was to be determined by the principles of maritime law:

> "as respected by maritime courts of all nations and adopted by most, if not by all, of them on the continent of Europe."

Although a number of this Court's decisions had earlier sustained the broader admiralty and maritime jurisdiction on specific issues, it was not until 1848 that this Court ruled squarely on the subject by declaring that,

> "* * * whatever may have been the doubt, originally, as to the true construction of the grant, whether it had reference to the jurisdiction in England, or to the more enlarged one that existed in other maritime countries, the question has become settled by legislative and judicial interpretation, which ought not now to be disturbed."

New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344, 380.

The *New Jersey Steam Nav. Co.* case also appears to be the landmark case respecting admiralty's jurisdiction over actions arising from maritime contracts of affreightment and wherein, speaking of admiralty's cognizance, this Court ruled that the jurisdiction must, in its nature, be complete,

> "for it cannot be confined to one of the remedies on the contract, when the contract is within its cognizance." 6 How. 344, 391.

In 1866, this Court stated that there was no distinction in principle between contracts for the carriage of merchandise by sea and contracts for the carriage of passengers by sea, because the passage money, in one case, is equivalent to the freight money, in the other, and a breach of either contract is an appropriate subject of admiralty jurisdiction. *The Moses Taylor*, 71 U. S. 411; 18 L. Ed. 397.

In the case at bar, we know that the contracts were maritime contracts which were breached by non-performance; that no substitute transportation was provided petitioners and that, though demanded, their respective fares prepaid as consideration for the promised transportation by sea, were not refunded.

This brings us down to the remedies or relief available to the petitioners for the breach and, since the contracts are within the cognizance of admiralty, whether such remedies or relief are *less* because in admiralty, than at law, simply because of the nomenclature with which the artificiality of the common law may chance to label them.

That admiralty could not relieve in a cause in which it has jurisdiction, where a common law court could if the action were brought in it, is an absurdity. The foundation for the relief is necessarily the contract from which stems all obligations. Whether petitioners were prospective passengers of a common carrier, by sea, rail, bus or air, does not lessen the remedies or relief to which they are entitled because they are matters of substantive law surrounding all contracts of transportation.

Before the Constitutional grant to our Federal courts of judicial power extending to all cases of admiralty and maritime jurisdiction, affreightment contracts and causes thereon were not within the jurisdiction of the English or colonial admiralty courts and suits thereon were relegated to the common law courts. It is inconceivable and contrary to plain common sense that our founding fathers, so anxious to throw off the English yoke of tyranny and the ridiculous jurisdictional situation existing in the English and colonial courts, intended to lessen the remedies and relief to which their countrymen were entitled for breaches of transportation contracts, simply because they were of a maritime nature over which they had expressly conferred jurisdiction in our Federal courts.

Reverting to the circumscribed jurisdictional limitations in the English admiralty, we nevertheless find this comment by Lushington, Judge of the High Court in Admiralty, in *Harriet*, 1 Rob. Adm. 183, 192:

> "If a court in equity could relieve, and a court of law could not, I consider that it would be my duty to afford that relief under the circumstances of the present case. The jurisdiction which I exercise is an equitable as well as a legal jurisdiction, and I must relieve the parties in this suit if they are entitled to be relieved by law or in equity."

It clearly appears, therefor, that despite the narrow limited scope of the subject matter within the jurisdiction of English admiralty courts, whenever the subject matter, as the basis for the action, was within their jurisdiction, the admiralty courts applied both legal and equitable principles in adjudicating the matters before them. And so, as Mr. Justice Story stated in the *Virgin*, 8 Pet. Adm. 538, 539; 8 L. Ed. 1036, speaking of the considerations which control the jurisdiction of the Federal courts sitting in admiralty:

> "Such courts, in the exercise of their jurisdiction, are not governed by the strict rules of the common law, but act upon enlarged principles of equity."

When obligations exist under the terms of a contract, or as a legal duty annexed to a contract by operation of law, if the contract be maritime it is clearly within the cognizance of admiralty and the jurisdiction is complete and cannot be confined to one of the remedies on the contract. *New Jersey Steam Nav. Co.* v. *Merchants' Bank*, 6 How. 344, 391, supra.

In the case at Bar, though the petitioners were entitled to sue for additional damages such as their expenses in coming to New York, putting up in hotels, etc. anticipating departure of the vessel (Cf. *The Normania*, S. D. N. Y., 62 Fed. 469), because the petitioners are scattered throughout the country such additional damages were not included be-

cause the expense of proving each person's supplemental damage would far exceed those damages. Consequently, each petitioner's damage was limited to that measured by the amount he had prepaid as passage money. By whatever label the artificiality of the common-law may attach to the claims of the petitioners, the substance of their demands is to be indemnified for the breaches of the contracts of carriage to the extent measured by the amounts they had paid thereunder as consideration, regardless of whether their claims be termed as "money had and received" pursuant to maritime contracts, or as claims for damages resulting from the breach by reason of failure to transport, or as claims for damages to the extent of the sums so paid arising from the breach of duty to refund which is annexed to the contracts of carriage by law.

Under the contracts of carriage, the petitioners had the duty to prepay their passage monies, which they did, while the respondent had the duty of transporting them by sea or provide substitute transportation, which he did not.

"Freight", the consideration under contracts for transportation by sea, is a subject matter that has been within our admiralty jurisdiction for many years and is to be determined on like legal principles in the case of transportation of passengers by sea. *The Main*, 152 U. S. 129, quoting from *Giles* v. *Cynthia*, 1 Pet. Adm. 203, 206. See also: *Brown* v. *Harris*, 2 Gray 359, wherein is stated that:

> "Passage money and freight are governed by the same rules. Indeed, 'freight', in its more extensive sense, is applied to all compensation for the use of ships, including the transportation of passengers."

Regardless of the common-law nomenclature of "money had and received", this money, received as consideration under the contracts of transportation, constituted "freight" since it was received pursuant to maritime contracts of carriage and therefore logically speaking, acquired the cloak of a "maritime" consideration.

IN THE

Supreme Court of the United States

October Term, 1955

No. 351

R. V. ARCHAWSKI, ET AL.,

Petitioners,

v.

BASIL HANIOTI, ETC.,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

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It is well settled that the shipowner can invoke the jurisdiction of the admiralty Court and sue for "freight" due to him for the performance on his part of a maritime contract of carriage and the non-performance of the shipper thereunder, who fails to pay the consideration, or "freight".

Under the doctrine of "equality under the law", or "equal application of the law", if the shipowner can recover freights due to him, in admiralty as a remedy, then the payors should have the right to recover their prepaid, unearned, freights, in admiralty, when the shipowner breaches his contracts. Such is only just and fair and merely reciprocity of remedies to the parties.

A century ago, in *Cobb* v. *Howard*, 5 Fed. Cas. 2925, aff'd C. C. N. Y., 5 Fed. Cas. No. 2924, it was held that the duties appertaining to passenger contracts for marine transportation were as maritime as the contracts themselves and that causes of action by passengers for the recovery of passage monies "had and received" by the defaulting carrier were just as maritime as the contracts and clearly within admiralty's jurisdiction. See, also: *The Pacific*, Fed. Cas. No. 10643, cited therein. And, in *The Guardian*, 89 Fed. 998 (D. C. Wash.), it was held that admiralty had jurisdiction *in personam* in actions against the carrier for the recovery of the amounts paid for such passage when the contract is breached. In the *Eugene*, 83 Fed. 222, also id. 9th Cir., 87 Fed. 1001, where the prospective passenger prepaid his fare and did not receive the transportation, because the contract was wholely executory it was held that he could not enforce his claim *in rem* against the vessel but was limited to an action *in personam*.

The Court of Appeals for the Fourth Circuit, in the very subject matter of the instant case, sub nom. *Acker et al.* v. *The City of Athens*, 177 F. 2d 961, affirmed the District Court of Baltimore for the reasons asserted by that Court in its lengthy, scholarly opinion, sub nom. *Todd Shipyards* v. *The City of Athens*, 83 Fed. Supp. 67, and in which, in

denying enforceability of the libelants' claims *in rem*, that Court stated (p. 64):

> "These contracts of affreightment for passenger transportation, *although maritime contracts of which the admiralty court would have jurisdiction*, do not constitute maritime liens, * * *." (Emphasis supplied.)

An analogous situation to that in the case at Bar, except that shippers of cargo, rather than prospective passengers, were involved, is the *Henry W. Breyer*, 17 F. 2nd 423 (D. C. Md.). There, the shipowner was likewise insolvent at the time he was soliciting the cargoes and receiving the prepaid freights and the vessel did not break ground because of his insolvency. In accord with this Court's statement in the *New Jersey Steam Nav. Co.* case, supra, that the jurisdiction in admiralty extends to all of the remedies on the contract without limitation, the District Court held that the shippers' actions for recovery of the unearned, prepaid freights were both in contract and tort, and within admiralty's jurisdiction. Extensive, sound, and authoritative reasoning is set forth in the *Breyer* case.

The United States Court of Claims has consistently dismissed claims for freight, and money had and received pursuant to maritime contracts, upon the ground that the jurisdiction lay in admiralty and not before it. *Isthmian Steamship Co. v. The United States*, 130 F. Supp. 336 (1955).

Nor do the allegations and proofs respecting the respondent's fraudulent machinations, alter the nature of the actions. Those allegations and proofs are ancillary to the nature of the actions and were necessary to support the prayer for coercive relief as well as the issuance of the writ of foreign attachment, which are simply equitable powers with which admiralty is clothed once acquiring jurisdiction. *Swift & Company Packers, et al, v. Compania Colombiana del Caribe, S. A.*, 339 U. S. 684; 1950 A. M. C. 1089. Such allegations are required under Admiralty Rules 2 and 3, together with Sec. 826 of the New York Civil Practice

Act whose provisions, respecting execution and remedies therefor, are made available in the admiralty Courts by Admiralty Rule 20. And, such allegations should be set forth in the libel as a matter of proper procedure. *U. S. v. Walsh*, Fed. Cas. No. 16,638.

In reversing the District Court, the Court of Appeals cited as authority its *Silva* v. *Bankers Comm'l Corp.*, 163 F. 2d 602 and *United Transportation & L. Co.* v. *N. Y. & Balt. T. Lines*, 185 F. 2d 386, cases. Commentators have thought, however, that if any doubts existed as to admiralty's jurisdiction over such actions, they were dispelled by *Krauss Bros. Lumber Co.* v. *Dimon S.S. Co.*, 290 U. S. 117. 47 Harv. L. Rev. 519, 520; 34 Col. L. Rev. 358, 359. Neither of the cited cases are apposite to the case at Bar and, in fact, appear to have been repudiated as authority, during the pendency of this cause before this Court, by the same Court of Appeals with a different bench (Clark, Hand and Waterman, C.JJ.; opinion by Hand, C.J.) in *Sword Line, Inc.* v. *United States*, Docket No. 23723, decided December 14, 1955 and not yet reported. The action there concerned an overpayment of charter hire and, upon its own initiative (p. 3), the Court of Appeals entered upon a consideration of whether or not admiralty had jurisdiction of the subject matter, though the question had not been raised by either party. Speaking of the nature of the action with respect to that question, Judge Hand stated (p. 4):

> "The suit is therefore in quasi contract for money had and received. In *United Transportation & Lighterage Co.* v. *New York & Baltimore Transportation Line*, 185 Fed. Rep. 386, this Court in 1911 after a full examination held that such claims were not so far maritime as to be justiciable in the admiralty; the Ninth Circuit held the same thing in 1926 (*Home Ins. Co.* v. *Merchants Transp. Co.*, 16 F. 2d 372); and in a dictum we repeated the doctrine in 1947 (*Silva* v. *Bankers Comm'l Corp.*, 163 F. 2d 603). Even though I were better convinced than I am that our original decision was wrong, I should feel it my duty to follow it and to leave the question to the Supreme Court, were it not for *Krauss*

Bros. Lumber Co. v. Dimon S.S. Co., 290 U. S. 117 (1933), of which we were apparently not aware when we decided *Silva v. Bankers Commercial Corporation*, supra (163 F. 2d 503).

* * * * * * *

For my own interpretation of the decision I rely upon what Stone, J., said on page 124 which is all there is on the point:

> "Even under the common law form of action for money had and received there could be no recovery without breach of the contract involved in demanding the payment, and the basis of recovery there, as in admiralty, is the violation of some term in the contract of affreightment, whether by failure to carry or by exaction of freight which the contract did not authorize.

My brothers do not agree with such a limited understanding of the decision: they think that it should be read so as to cover claims in quasi-contract; but under either understanding it is clear that the district court had jurisdiction over the suit at bar."

Immediately preceding the quotation by Judge Hand from the *Krauss* case, this Court stated therein:

> "It has been argued to us, as it has been in other cases, that, as the payment for excess freight was made under mistake, the demand is upon a cause of action for money had and received, which lies only at common law and not in admiralty. The objection applies with equal force to the liens allowed for excess freight, payment of which was procured by fraud and duress, or for freight paid in advance where the voyage was abandoned after the ship was loaded. Admiralty is not concerned with the form of the action, but with its substance." *Krauss v. Dimon S.S. Co.*, 290 U. S. 117, 124.

The foundation for petitioners' action necessarily was the breach—the failure to carry—and the relief sought, and allowed to them by the District Court, was simply damages for the breach—such damages being measured by the respective amounts each had paid pursuant to the contracts as

consideration for the promised transportation whether such relief be artificially labeled as "money had and received", under common law nomenclature, or as "damages", as set forth in the libel (T. 17).

Since the jurisdiction depends upon the nature of the contract, *The Eclipse*, 135 U. S. 599, 608, upon all claims arising therefrom such jurisdiction cannot be confined to only one of the remedies on the contract when the contract is within admiralty's cognizance, *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 391, and the Court of Appeals erred in reversing the District Court and causing it to dismiss the action, thereby vacating the final decree.

QUESTION NO. 2

After the proofs are in jurisdiction of the subject matter, in admiralty, is determined by the proofs as reconciled to the libel.

Assuming, arguendo, that the libel sets forth claims limited to the nature of indebitatus assumpsit, for money had and received, based upon the wrongful withholding of moneys by the respondent as construed by the Court of Appeals (T. 3) and over which admiralty would not have jurisdiction, the Court failed to give regard to 28 U. S. C. 2111, which required it to allow amendment of any technically defective allegations. There is no doctrine of mere technical variance in admiralty, and an omission to state facts which prove to be material but which cannot have occasioned any surprise to the opposite party, will not be allowed to work any injury to the libelant, if the Court can see there was no design on his part in omitting to state them. It is the duty of the Court to extract the *real case from the whole record*, and decide accordingly. *The Syracuse*, 79 U. S. 382. Nor is the Court precluded from granting the relief appropriate to the case appearing on the

record, and prayed for by the libel; because that entire case is not distinctly stated in the libel. The Court decrees upon the whole matter before it. *DuPont* v. *Vance*, 60 U. S. 584, 587. See also, *Dampskibs Aktiesselkabet Thor* v. *Tropical Fruit Co.*, 281 Fed. 740, 742 (C. C. A. 2nd). Nor, does some inaccuracy in the statement of subordinate facts, or of the legal effect of the facts propounded, preclude the Court from awarding any relief, which the law applicable to the whole case warrants. *The Gazelle*, 128 U. S. 496. Admiralty is not concerned with the form of the action, but only with its substance. *Krauss*, supra.

The strained, prejudicial construction placed upon the libel by the Court of Appeals could only arise by virtue of its application of principles of construction of pleadings akin to the narrow and inconsistent New York Civil Practice Act and Rules, and its neglect to reconcile the proofs to the libel or heed the mandate of 28 U. S. C. 2111.

About two decades ago, the law side of the Federal courts abandoned such archaic practices and adopted the long standing admiralty rule to the effect that: if upon the facts established libelants can recover upon any proposition of law within the scope of admiralty's jurisdiction, the libel must be sustained.

Upon the whole record therefor, reconciling the proofs to the libel as the District Court did (T. 10), the petitioner's action was upon the contract and within the admiralty jurisdiction and the yardstick of review by the Court of Appeals was erroneous.

QUESTION NO. 3

The Court of Appeals lacked jurisdiction to review.

The Final Decree (T. 12-13) of the District Court was entered on December 6, 1954, from which an appeal was not taken by the respondent until March 24, 1955 (T. 4)—108 days after its entry.

Though respondent made various motions in the District Court to vacate the final decree, all of his motions were seasonably denied by February 9, 1955 (T. 11) long before the expiration of the statutory period of ninety days (28 U. S. C. 2107)—March 6, 1955—within which an appeal from the final decree could be taken. Though respondent endeavored to appeal from the orders denying his motions to vacate the final decree, etc., such orders are unappealable as final orders unless the motions are grounded upon fraud, mistake, inadvertence, etc. *Taylor* v. *U. S.*, 145 F. 2d 641, 643 and cases therein cited. No such grounds were advocated below, as the District Court's opinion clearly shows (T. 5), nor was there any such contention in his two motions in the Court of Appeals (R. I, XVII) for a stay of execution which were likewise denied (R. XV, LII), on February 18, 1955 and March 2, 1955, respectively.

It is well settled that an order denying a judgment-debtor's motion for recall of a writ of capias and, in the alternate, a stay of execution, is not appealable as a final order. *Sabadash* v. *Schiro*, 128 F. 2d 923, and the authorities therein cited.

No application below for an order extending his time within which to appeal from the final decree was ever made by the respondent.

Though petitioners seasonably moved the Court of Appeals for an order dismissing the respondent's attempted appeals (R. LXV), the Court deferred consideration of the motion until consideration by it of the attempted appeals upon the merits, whereupon it, apparently, ignored the motion and rendered its decision upon the merits (T. 1).

Cited to the Court of Appeals on the motion to dismiss (R. LXVIII, LXIX, LXXI) were the above authorities, as well as this Court's *National Union of Marine Cooks* v. *Arnold*, 99 L. Ed. Adv. 70 case, and its citations, respecting the right of an appeal, if otherwise timely, of a judgment debtor who deliberately absents himself from the jurisdic-

tion for the purpose of frustrating the process of the Court, and jeopardizing the effectiveness of a money judgment.

The attempted appeals were untimely and not within the jurisdiction of the Court of Appeals and, assuming that there existed some corrective, technical, defect, of which there is none upon this record, the action of the Court of Appeals, in reviewing the District Court's determination upon the merits, constituted a prejudicial abuse of such discretionary powers, which it may have possessed, and has opened wide the door of escape for judgment debtors, such as the respondent, and reduced the value of a money judgment of a district court and the powers of execution, thereunder, to a mere scrap of paper. Upon this record, judgment debtors may remove themselves and their assets from the jurisdiction to avoid execution and, at the same time, prosecute an appeal without even so much as posting security for costs; let alone supersedeas, to the prejudice of the judgment-creditor and with impunity should the review, by the Court of Appeals, be construed as having been within its jurisdiction, or proper under the circumstances.

CONCLUSION

For all of the foregoing reasons the judgment of the Court of Appeals for the Second Circuit should be reversed and the case remanded to the United States District Court for the Southern District of New York with directions to reinstate its final decree.

Dated, New York, N. Y., December 31, 1955.

Respectfully submitted,

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District Judge Learned Hand, in sustaining the exceptions to the jurisdiction of admiralty over the libel, stated, at page 920, as follows:

> "I do not see any just distinction between paying for maritime services actually rendered more than one need, and paying for such services when not rendered at all. If any distinction is to be drawn, I should suppose that the first payment was closer to maritime matters than the second. The Oceana (D. C.) 148 Fed. 131, stands upon a genuine distinction, pointed out by Judge Hough, who also tried Union Transp., etc. Co. v. N. Y., etc., Trans, Co., supra. The ship had agreed to deduct from the freight all disbursements paid by the charterer who mistakenly overpaid her. The right of recovery rested upon the ship's unfulfilled promise and could indeed have been so pleaded at law, the payment and mistake in payment being successively pleaded in a voidance as plea and replication. The right to sue in *indebitatus assumpsit* should not obscure that very obvious difference."

Another leading case supporting the respondent's contention is *United Transportation & Lighterage Co. v. New York & Baltimore Transp. Line*, 185 Fed. 386, wherein the Court, at page 389, stated as follows:

> "Of course the action of assumpsit for money had and received, while in form an action of law, is based upon equitable principles, and it is by no means obvious that it would be broad enough to afford relief in the case of such a transaction as is stated in the cross-libel. Still, for the purposes of this case, we will assume that the contention of the respondent is well founded, and that an action at law would lie against the libellant corporation upon

its implied promise to repay moneys received by it which in justice and good conscience it ought not to retain."

and at pages 390, 391, further stated as follows:

"The maritime contract was the one which the respondent says was fraudulent. It does not seek to enforce but to avoid that. It cannot, however, have such contract set aside without invoking the equitable relief which a court of admiralty cannot grant. Moreover, even from this point of view, the matter is not maritime. * * *

As we have already stated, the remedy of the respondent, if its charges be well founded, would seem to be in equity to set aside the alleged wrongful agreement and to compel an accounting. Perhaps, as we have also seen, an action in assumpsit for money had and received would lie. But a court of admiralty cannot afford the necessary equitable relief; nor can it grant the legal relief, because the implied promise to repay the moneys which cannot in good conscience be retained—necessary to support the action for money had and received—is not a maritime contract."

(2)

The petitioner studiously avoids mentioning the fact that the respondent filed three separate notices of appeal, each of which was timely. The respondent appealed from the decision and order of January 11, 1955, by notice of appeal dated and filed February 9, 1955—within a period of less than thirty days. The respondent appealed from the opinion, decision and order of February 9, 1955, by notice dated and filed February 17, 1955—within a period of less than thirty days. The respondent also appealed from the decree docketed as a judgment on January 11,

INDEX

Table of Cases

Rule Cited

IN THE

Supreme Court of the United States

October Term, 1955

No. 351

R. V. ARCHAWSKI, *et al.*,

Petitioners,

v.

BASIL HANOTI, *etc.*,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the United States District Court for the Southern District of New York is reported in 123 Fed. Supp. 410. The opinion of the Court of Appeals for the Second Circuit is reported in 223 Fed. (2d) 406.

Questions Presented

The questions presented by the petitioner are non-existent:

1. There is no question presented for review concerning the admiralty jurisdiction of the District Court over maritime contracts since his action was not an action based upon contract seeking the recovery of passage moneys but was a claim against a third party, the respondent herein, who was not the owner of the vessel and had no contractual

relation with the claimants, which claim was based upon alleged tortious conduct in the nature of fraud.

2. As will hereafter be demonstrated the "question" raised by petitioner of the jurisdiction of the Court of Appeals to entertain the appeal is frivolous.

Statement of Case

On the 16th day of September, 1952, an in personam suit in admiralty was commenced by the filing of a libel and a writ of foreign attachment against the SS CARMEN, which was owned by the Basile Shipping Company, Inc. (R. 245-258). After the said writ had been executed by the United States Marshal a third party claim was filed on behalf of said Basile Shipping Company, Inc., a New York corporation which had its principal place of business in the Southern District of New York, claiming that it was the lawful owner of the SS CARMEN and that said vessel had been wrongfully attached and that Basil Hanioti, the respondent herein, had no interest whatsoever in said vessel. Hearings were held before the Honorable Sylvester J. Ryan, United States District Judge (R. 1-187a), and as a result thereof a decision was rendered on the 24th day of September, 1952, in which the Court held that it was without jurisdiction in said suit to issue a writ of foreign attachment and therefore dismissed the same (R. 264-269).

During the course of the hearings the respondent herein, who had not been previously served with the libel, appeared voluntarily by Frank H. Cooper and Frank Delaney, his attorneys, and filed an appearance in the suit (R. 270). Subsequently said respondent interposed an answer denying all of the material allegations of the libel (R. 285-288).

The libel, in effect, charges that the respondent obtained moneys through various acts of fraud and fraudulent

representations and used various corporations to accomplish the fraud and converted moneys so fraudulently obtained to his own use. The charges of obtaining moneys through fraud, conversion and misapplication of funds are all interwoven in one cause of action. There is no allegation in the libel that the respondent entered into any contract with any of the libellants.

The libel is one for damages by reason of fraud, conversion and misappropriation of funds. The suit, although labelled as an admiralty action (apparently in order to give the Federal Court jurisdiction) is not a suit in admiralty and was subject to dismissal for that reason alone since there were no allegations in the libel showing diversity of citizenship between the libellants and the respondent, or showing that each libellant had a claim for $3,000 or over.

The Court of Appeals in its opinion, after analyzing the complaint, stated that while a contract for the transportation of passengers by sea is a maritime contract, and a suit for its enforcement would plainly be within the admiralty jurisdiction of the District Court, this libel sets forth no such claim and, further, that if the libel is viewed as stating some sort of a claim based upon tortious conduct in the nature of fraud, as seems to have been the intent of the pleader, the case against admiralty jurisdiction is even clearer.

The trial of the suit was scheduled for November 24, 1954. The respondent herein did not appear but Frank H. Cooper, one of the attorneys of record for said respondent, did appear and permitted an inquest to be taken without making any effort on behalf of the respondent to defend the suit (R. 188-197), and on the 6th day of December, 1954, a default decree was entered and signed by the Honorable Lawrence E. Walsh, United States District Judge, under the terms of which the respondent herein was required to pay to the libellants the sum of $130,383.69 (R. 293, 294).

The decree also contained a provision that unless it was satisfied within ten days from the date of service upon the said respondent's attorneys, with notice of entry thereof, and unless execution thereunder was stayed by an appeal with proper and approved security thereon within the ten day period, the Clerk of the District Court was directed to issue to the United States Marshal a writ of attachment against the person of said respondent.

On the 7th day of December, 1954, the respondent, acting through a new attorney, obtained an order to show cause to vacate the default decree and to enjoin the enforcement of the body execution (R. 299-315a). In support of said motion the respondent urged (a) that the default was not wilful or deliberate and the libellants were not entitled to enter a default judgment; (b) that the libellants failed to offer evidence at the inquest before the District Court sufficient to make out a *prima facie* case and that, on the contrary, the libellants failed to offer any admissible evidence in support of the libel; (c) that the respondent had a good and meritorious defense to the alleged cause of action; (d) that although the suit was brought in admiralty it was in fact a civil suit over which the Federal Court did not have jurisdiction since it failed to allege diversity of citizenship and the jurisdictional amount in connection with each claim; (e) that under no circumstances should the decree have carried with it a writ of execution against the person of the respondent.

The said motion was denied on the 11th day of January, 1955, by a written memorandum endorsed upon the moving papers (R. 299-315a). On the same day, to wit, the 11th day of January, 1955, the final decree was docketed as judgment #59,801 (R.B.). This apparently was necessary in order to issue execution to the Marshal. A proposed order with notice of settlement was thereupon submitted, based upon the foregoing decision, and thereafter District Judge Walsh refused to sign said order and handed down an opinion and order, on the 9th day of February, 1955, again denying

the motion of the respondent herein to vacate the decree of the 6th day of December, 1954 (R. 317-324).

The respondent herein appealed from the decision of January 11, 1955, by notice of appeal dated and filed the 9th day of February, 1955, within the thirty day period (R. 325). Said respondent appealed from the opinion decision and order of February 9, 1955, by notice of appeal dated and filed the 17th day of February, 1955, within the thirty day period from said order (R. 326). Said respondent also appealed from the decree docketed as a judgment on the 11th day of January, 1955, by notice of appeal dated and filed the 24th day of March, 1955, within ninety days from the date of the docketing of the decree as a judgment (R. 391).

ARGUMENT

There is no basis for the allowance of the writ.

(1)

The decision of the Court of Appeals is not in conflict with any decision of another Court of Appeals on the same matter and is not in conflict with any applicable decision of this Court.

The cases cited by the petitioner herein are either proceedings *in rem* or are actions based upon an express contract.

The decisions cited by the petitioner are not in conflict with the decisions of the Court of Appeals in the case at bar and, as a matter of fact, the cases cited support the decision of the Court of Appeals. The Court of Appeals, at pages 407 and 408, stated as follows:

> "While a contract for the transportation of passengers by sea is a maritime contract, and a

suit for its enforcement would plainly be within the admiralty jurisdiction of the District Court, this libel sets forth no such claim, but rather is in the nature of the old common law *indebitatus assumpsit*, for money had and received, based upon the wrongful withholding of moneys by respondent, on the theory that in equity and good conscience he is under a duty to pay them over to libellants. *Silva v. Bankers Commercial Corporation*, 163 F. 2d 602 (C. C. A. 2, 1947); *United Transp. & L. Co. v. New York & Baltimore T. Line*, 185 Fed. 386 (C. C. A. 2, 1911). If the libel is viewed as stating some sort of a claim based upon tortious conduct in the nature of fraud, as seems to have been the intent of the pleader, the case against admiralty jurisdiction is even clearer."

It is clear from the foregoing that Circuit Judge Medina recognized the principle of law that a contract for transportation of passengers is a maritime contract and that a suit for its enforcement would be within the admiralty jurisdiction of the District Court but Circuit Judge Medina stated that the libel in the case at bar sets forth no such claim.

The petitioner cites no case that a claim which is in the nature of the old common law *indebitatus assumpsit*, for money had and received, based upon the wrongful withholding of moneys, may be maintained in admiralty. Nor does petitioner cite any case that a libel alleging a claim based upon tortious conduct in the nature of fraud is within the admiralty jurisdiction.

Circuit Judge Medina, in analyzing the libel, came to the inescapable conclusion that the cause of action was not based upon a contract. An analysis of the libel conclusively supports the finding that it was not based upon a contract and could not have been based upon a contract. Respondent

Hanioti was not a party to any contract. Under the most liberal interpretation of the libel, he is being sought to be held liable as a *trustee ex maleficio*.

A case directly supporting the decision of the Court of Appeals is *Silva et al. v. Bankers Commercial Corporation* (C. C. A. 2) 163 Fed. (2d) 602. That was a civil suit in which federal jurisdiction was based upon a diversity of citizenship of the parties and the required amount involved. In that case the plaintiffs recovered judgment against the defendant in an action brought to recover freight money which had been paid to the defendant's assignor in connection with a voyage which was abandoned by the carrier, with the consent and assistance of the defendant. The defendant argued that the issues involved in the suit were maritime and were governed by the rules of admiralty. The Court of Appeals did not agree with this contention and, at pages 604 and 605, stated as follows:

> "* * * *The claim asserted is in the old common law action of indebitatus assumpsit, over which a court of admiralty has no jurisdiction. It would make no difference whether the claim was based upon unjust enrichment or fraudulent representations—of which there were none in this case; in neither event would recovery lie in admiralty.* United Transp. & L. Co. v. New York & Baltimore T. Line, 2 Cir., 185 F. 386, 389; Minturn v. Maynard, 17 How. 477, 15 L. Ed. 235; Israel v. Moore & McCormack Co., D. C., 295 F. 919. The jurisdiction of the District Court was based on diverse citizenship of the parties. The action is for recovery at common law and under the rule of Erie R. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487, is governed by the law of the State of New York" (italics ours).

Kaufman et al. v. John Black & Co. Inc. et al., 60 Fed. Supp. 992 (D. C. S. D. N. Y.) is another case in point.

There the libel contained two causes of action. The first cause of action alleged a breach of contract to carry goods by sea and was within the admiralty jurisdiction of the Court. The second cause of action alleged that the principal was a wholly fictitious corporation and that the respondents knew it was a wholly fictitious corporation which was not the charterer or operator of the "Marie Anna" of any other vessel and that the respondents represented themselves as officers, directors and agents for the "Marie Anna" and used fictitious names in so holding themselves. The District Court, with respect to the second cause of action, stated, at page 993, as follows:

> "*This cause of action is either for moneys had and received or for fraud. In either event, it is not maritime but a pure common law action. This Court's admiralty jurisdiction does not extend to any suit not maritime.* Rea v. The 'Eclipse', 135 U. S. 599, 10 S. Ct. 873, 34 L. Ed. 269, nor can non-admiralty causes of action be joined to admiralty ones. Westfall Larson & Co. v. Allman-Hubble Tug Boat Co., 9 Cir., 73 F. 2nd 200; The Yankee, D. C., 37 F. Supp. 512, 513.
>
> Giving full faith and credit to the allegations of the second cause of action in the libel, it seems to me *that the charge set forth is one of obtaining money under false and fraudulent representations; a common law action.* True, the artifice used is a bill of lading but this cause of action has not to do with the bill of lading but with the obtaining of money by fraud" (italics ours).

A cause of action charging fraud and deceit in falsely representing corporate power in a corporation to make an alleged guarantee of demurrage in the event a certain vessel fails to clear the port of loading within the free time allotted to the shipper is not within admiralty jurisdiction

and another cause of action for breach of an individual representation and warranty that the said guarantee was the full act and deed of the corporation would not bring it within the jurisdiction of the Court. *Black Sea States SS Line* v. *Association of International Trade Dist. 1, Inc., et al.*, 95 Fed. Supp. 180.

In *Williams* v. *Providence Washington Insurance Co.* 56 Fed. 159 (D. C. S. D. N. Y.) a libel was filed to recover under a policy of insurance issued by the respondent against perils of the sea. The boat was damaged by sea perils in Long Island Sound, at a dock at Stamford, Conn. The policy was accepted and a premium paid in reliance upon certain representations which were false and fraudulent when made. The libellant claimed that since it complied with the conditions of the policy it was entitled to recover damages in the amount of the loss. Exceptions were filed to the libel for lack of jurisdiction of the cause of action stated in the libel. The Court, in sustaining the exceptions to the jurisdiction stated, at page 160, as follows:

> "* * * *The complaint is, in fact, an action for false and fraudulent representations, by which the libellant was inducted to accept the policy, supposing that he was insured for the Sound, when he was not. Such an action is not upon the policy itself, but upon the negotiations leading to it. It is not brought like The Electron, 48 Fed. Rep. 689, for any misrepresentations in the policy or for damages in the execution of the policy. The representations here are no part of the contract, but outside of it, and anterior, or preliminary to the contract, and as such not properly maritime*" (italics ours).

Even if the libel be interpreted as pleading a cause of action for moneys had and received or in *indebitatus assumpsit*, there would be no admiralty jurisdiction. In *Israel et al. Moore & McCormack Co. Inc.*, 295 Fed. 919,

1955, by notice of appeal dated March 24, 1955 within a period of ninety days from the docketing of the decree as a judgment.

All of the appeals were timely and properly taken. The orders from which the appeals were taken were based upon a motion to set aside a default decree entered after inquest. Such orders are final because they affect the ultimate outcome of the controversy.

A case in point is *Weilbacher* v. *J. H. Winchester & Co.*, 197 Fed. (2d) 303 (U. S. C. A. 2 Cir.) wherein the Court, in discussing the question of the finality and appealability of orders based upon motions to set aside judgments, stated, at page 305, as follows:

> "At the outset we must determine whether the order appealed from is a final order within the purview of Section 1291 of the Judicial Code. 28 U. S. C. A. § 1291. Obviously, the objective of that section is to forestall appellate review when the decision below has but an inconclusive effect on the final outcome of the litigation. *This is best illustrated in the example of a motion, also under Rule 60 (b), to reopen a default judgment. Thus, the denial of such a motion is a final order, Tozer* v. *Charles A. Krause Milling Co., 3 Cir., 189 F. 2d 242, for by its decision the district court has indicated that no further action will be taken at that level which will change the outcome and unless the order is appealable the controversy is at an end. On the other hand, the granting of the motion is not reviewable, United States* v. *Agne, 3 Cir., 161 F. 2d 331, since the ultimate disposition of the case may not be affected thereby*" (italics ours).

Another case in point discussing the finality and appealability of an order such as in the instant action is *Greenspahn* v. *Joseph E. Seagram & Sons*, 186 Fed. (2d) 616,

(U. S. C. A. 2 Cir.) where the Court, at page 619, stated as follows:

> "* * * But we are willing to go further and state our belief that the order is appealable as fully as any other final order. Rule 60 (b) expressly provides that a motion made thereunder 'does not affect the finality of a judgment or suspend its operation'. An order denying such a motion puts an end to any further action by the district court and leaves the judgment in full force and effect. We think it is a final order and therefore appealable."

In *Sterirmac Oil & Gas Co.* v. *Dittman*, 245 U. S. 210, 38 Sup. Ct. 116, the Court, at page 118, stated as follows:

> "The plaintiff in error correctly contends that the proceeding to set aside the original judgment is in effect an independent action, and the judgment therein final and reviewable. The proceeding to set aside the original judgment is based upon the theory that *no jurisdiction was acquired over the Sterirmac Oil & Gas Company* by the service of the process as amended by the court's order, and hence the company was never properly subject to the jurisdiction of the court in the original suit. No contention is made that the court could not entertain the proceeding to set aside the judgment, indeed it did entertain jurisdiction and decided against the contention of the plaintiff in error. In such case we have no doubt that in view of the nature of the attack made upon the original judgment, the judgment in the present proceeding was final, and reviewable in the Court of Appeals" (italics ours).

Assuming, without conceding, that the docketing of the decree as a judgment on January 11, 1955, did not fix the time for the commencement of the ninety day period,

as contended by the libellants, the appeal taken on March 24, 1955, was still timely since under Rule 73 (a) of the Federal Rules of Civil Procedure the running of the time of appeal was terminated by the motion made to set aside the judgment and therefore the time to appeal must be computed from the entry of the order denying the motion to vacate the judgment, to wit, January 14, 1955; the date of the first decision, or February 9, 1955, the date of the filing of the opinion and order. Cases supporting this rule are:

Leishman v. *Associated Wholesale Electric Co.*, 318 U. S. 203, 63 Sup. Ct. 543, 544;

Salmon et al. v. *City of Stuart, Fla.*, 194 Fed. (2d) 1004 (U. S. C. A. 5 Cir.).

In *United States ex rel. Harrington* v. *Schlatfeldt*, 136 Fed. (2d) 935, the Court, at page 937, stated as follows:

> "Appellee urges that the appeal is improperly before us in view of the fact that notice of it was filed on December 28, from a decree entered September 22. The court permitted the filing of a motion to vacate the decree on December 19, ordered the Government to answer, and set the matter for hearing. Where such motion to vacate is permitted to be filed and taken under consideration prior to the expiration of the period allowed for taking an appeal, we are of the opinion that it suspends such period, and that notice of appeal duly filed after disposition of the motion is filed and timely. Cf. Zimmern v. United States, 298 U. S. 167, 56 S. Ct. 706, 80 L. Ed. 1118; Wayne Gas Co. v. Owens Illinois Glass Co., 300 U. S. 131, 57 S. Ct. 382, 81 L. Ed. 557. We think the Federal Rules of Civil Procedure, Nos 6, 59 and 60, 28 U. S. C. A. following section 723c do not require a contrary ruling."

To the same effect see:

Reliance Life Insurance Co. v. Burgess, 112 Fed. (2d) 234;

Neela v. Merchants Trust Co. of Red Bank, New Jersey, 110 Fed. (2d) 525.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted.

FRANK L. SHILLIS,
Counsel for Respondent.

SAMUEL BADER,
of Counsel.

IN THE

Supreme Court of the United States

October Term, 1955

No. 351

R. V. ARCHAWSKI, ET AL.,
Petitioners,

v.

BASIL HANIOTI, ETC.,
Respondent.

RESPONDENT'S BRIEF

FRANK L. MILLER,
Counsel for Respondent.

INDEX

Cases Cited

Statutes and Rules Cited

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RESPONDENT'S BRIEF

Statutes and Rules Involved Not Mentioned by Appellants

Rule 55 (b) (2) of the Federal Rules of Civil Procedure:

"(b) Judgment. Judgment by default may be entered as follows: * * *

"(2) *By the Court.* In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least three days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary

to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States."

Rule 60 (b) of the Federal Rules of Civil Procedure:

"(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U. S. C., 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the pro-

cedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action." As amended Dec. 27, 1946, eff. March 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949."

Rule 73 (a) of the Federal Rules of Civil Procedure:

"(a) When and How Taken. When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be thirty days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall be sixty days from such entry, and except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed. The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: granting or denying a motion for judgment under Rule 50 (b); or granting or denying a motion under Rule 52 (b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59.

A party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the Appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule or, when no remedy is specified, for such

action as the appellate court deems appropriate, which may include dismissal of the appeal. If an appeal has not been docketed, the parties, with the approval of the district court, may dismiss the appeal by stipulation filed in that court, or that court may dismiss the appeal upon motion and notice by the appellant."

Rule 20 of the Admiralty Rules:

"In all cases of a final decree for the payment of money, the libellant shall have a writ of execution, in the nature of a fieri facias, commanding the marshal or his deputy to levy and collect the amount thereof out of the goods and chattels, lands and tenements, or other real estate of the respondent, claimant, or stipulator's. And any other remedies shall be available that may exist under the state or federal law for the enforcement of judgments or decrees."

Section 826, subdivision (9) of the Civil Practice Act of the State of New York:

"9. In an action upon contract, express or implied, where it is alleged in the complaint that the defendant was guilty of a fraud in contracting or incurring the liability, or that, since the making of the contract, or in contemplation of making of the same, he has removed or disposed of his property with intent to defraud his creditors, or is about to remove or dispose of the same with like intent; but where such allegation is made, the plaintiff cannot recover unless he proves the fraud on the trial of the action; and a judgment for the defendant is not a bar to a new action to recover upon the contract only."

Section 764 of the Civil Practice Act of the State of New York:

"764. Issuance of execution against the person generally. Subject to the exception specified in the

next section; an execution against the person of a judgment debtor, may be issued by the court or a judge or justice thereof, upon application by the judgment creditor, in a case where the judgment can be enforced by execution, as prescribed by section five hundred and four of this act, and where the plaintiff's right to arrest the defendant depends upon the nature of the action. The issuance of the execution shall rest in the discretion of such court, judge or justice. The application for the issuance of the execution may be made without notice, or with such notice as the court, judge or justice may direct, and shall be made by affidavit which shall set forth in detail the right of the party to the execution, the amount of the judgment, the amount unpaid, and the time when and place where the execution against the judgment debtor's personal property has been returned wholly or partially unsatisfied."

Questions Presented

1. Is the instant action against the respondent in fraud cognizable in admiralty?

2. Did the libellants meet the burden to establish, by legal proof, the allegations of the libel where the respondent had filed an answer placing in issue the material allegations and, if so, did the District Court err in granting a default decree based upon insufficient evidence?

3. Did the District Court act arbitrarily and abuse its discretion in refusing to set aside the default judgment?

4. Was the inclusion of a provision for execution against the person of the respondent in the decree unauthorized in an admiralty suit and otherwise contrary to law?

5. Was the notice of appeal, filed within thirty days of the denial of the respondent's motion to vacate the default judgment, timely?

6. Did the docketing of the decree as a judgment, in order to issue an execution, fix the time within which to appeal?

7. Did the making of the motion to open the default toll the running of the time to appeal until the entry of the order denying the motion?

Summary of Argument

1. The instant action is not an action based on a maritime contract, either express or implied, but is a common law action to recover for damages for obtaining moneys through fraud and false representations, over which the Admiralty Court does not have jurisdiction.

2. The judgment is not supported either by the allegations of the libel or the proof. The respondent filed an answer denying the material allegations of the libel and because he did not know when the case was on for trial, and had received no notice to that effect, he did not appear. Nevertheless, the District Court permitted the libellants to take an inquest, but received no oral testimony, relying instead upon voluminous transcripts of testimony given by the respondent and other witnesses in an action *in rem* instituted in the United States District Court in Baltimore by Todd Shipyards Corporation against "SS City of Athens", and in which the libellants intervened as parties to establish their claims. The District Court could not have read this testimony within the short time devoted to the inquest. In any event, the testimony fails to establish frauds on the part of respondent but, on the contrary, the testimony shows that the respondent was innocent of fraud.

3. Denial of respondent's motion to vacate the default judgment was an abuse of discretion. The default was not

wilful and was excusable. Moreover, the entry of a judgment by default without giving the notice required by the Federal Rules of Civil Procedure was improper and required the granting of respondent's motion to vacate the judgment.

4. The inclusion in the decree of a provision for the issuance of execution against the person of the respondent to enforce the payment of the judgment was unlawful. Whatever contractual allegations, if any, are contained in the libel, and it is contended that none are, they do not relate to transactions with the respondent but with various corporations. It is essential that fraud be perpetrated in incurring the liability on a contract. The respondent's liability, on the theory of the libel in the instant case, would be that of a tort feasor in a fraud action. There was not one iota of evidence submitted before the District Judge at the inquest to prove any of the requisite allegations of fraud to bring it within Section 826, subdivision (9), of the Civil Practice Act.

Moreover, Rule 20 of the Admiralty Rules authorizes the issuance of an execution under the state law against the property of the respondent to enforce a decree or judgment in admiralty, but not against the person of the respondent. The decree is equitable in nature and hence the body execution is unauthorized by Section 826, subdivision (9) of the Civil Practice Act.

The body execution is also unauthorized for the reason that there was no trial of the action, within the meaning of Section 826, subdivision (9) of the Civil Practice Act.

5. The notices of appeal were timely. There are three notices of appeal in the instant case. The first two, which libellants wholly ignore, were filed within thirty days from the entry of orders denying the motion to set aside the default judgment and are proper and timely, since the two

orders entered denying the motion to set aside the judgment taken by default are final and appealable.

The third appeal was taken, perhaps in an excess of caution, from the default decree docketed as a judgment on January 11, 1955, by a notice of appeal dated March 24, 1955, within a period of ninety days from the docketing of the decree. This appeal is timely for two reasons: firstly, because the time to appeal starts to run ordinarily from the docketing of the decree as a judgment; and, secondly, the order denying the motion to set aside the judgment was not entered until February 9, 1955, and the running of the time to appeal is tolled until the entry of the order denying the motion to set aside the default decree. However, it is immaterial whether the appeal from the decree was timely since the first two appeals from the orders denying the motion to set aside the default decree were admittedly timely.

Statement

On the 16th day of September, 1952, an *in personam* suit in admiralty was commenced by the filing of a libel and a writ of foreign attachment against the "S. S. Carmen", which was owned by the Basile Shipping Co., Inc. (R. 245-258; F. 14-27).

The libel alleges that the respondent, Basil Hanioti, hereinafter referred to as the "respondent", did business under his own name and under various other names and corporations and organized the Basile Shipping Co., Inc. for the purpose of engaging in fraudulent practices; that the respondent, operating through the various corporations as his *alter egos*, owned and controlled a certain passenger vessel known as the "City of Athens"[1] of Hon-

[1] This vessel was owned by a Panamian corporation, Sociedad Naviera Transatlantica S. A. See *Ickes v. Hanioti*, 276 App. Div. 78, 92 N. Y. Supp. (2d) 914.

duran registry, and between November 9th, 1946 and July 23rd, 1947, the said respondent and his *alter egos* advertised and held out the steamer "City of Athens" as a common carrier of passengers for hire; that the libellants paid monies for passage upon said vessel; that the libellants never obtained the passage for which they paid and that the respondent converted the monies so fraudulently obtained to his own use and purposes. None of the respondents named in the libel were served with process.

The writ was executed by the United States Marshal against the "S. S. Carmen" which was owned by the Basile Shipping Co., Inc. because of the allegation that the respondent is the owner of the "S. S. Carmen" and that he is conducting business under the name of Basile Shipping Co., Inc., his *alter ego* and created by him in an attempt to shield himself from liability and satisfaction of any decrees that may be issued against him in connection with his manipulations and operations, and is, in fact, a fraud and a sham and a mere dummy within his control.

The libel, in effect, charges that the respondent obtained monies through various acts of fraud and fraudulent representations and used the various corporations to accomplish the fraud and converted monies so fraudulently obtained to his own use.

The charges of obtaining monies through fraud, conversion and misrepresentation of funds are all interwoven into one cause of action. *There is no allegation in the libel that the respondent entered into any contract with any of the libellants.*

After the said writ had been executed by the United States Marshal, a third party claim was filed on behalf of the said Basile Shipping Co., Inc., a New York corporation, which had its principal place of business in the Southern District of New York, claiming that it was the lawful owner of the "S. S. Carmen" and that said vessel had been

failed to offer any admissible evidence in support of the libel; (c) that the respondent had a good and meritorious defense to the alleged cause of action; (d) that although the suit was brought in admiralty, it was, in fact, a civil suit under which the Federal Court did not have jurisdiction since it failed to allege diversity of citizenship and the jurisdictional amount in connection with each claim; and (e) that under no circumstances should the decree have carried with it a writ of execution against the person of the respondent.

The said motion was denied on the 11th day of January, 1955 by a written memorandum endorsed upon the moving papers (R. 229-315a). On the same day, to wit, January 11th, 1955, the final decree was docketed as Judgment No. 59804. This apparently was necessary in order to issue execution to the Marshal.

A proposed order with notice of settlement was thereupon submitted based upon the decision and thereafter the District Judge refused to sign said order and handed down an opinion and order on February 9th, 1955 again denying the motion of the respondent to vacate the decree of December 6th, 1954 (R. 317-324; T. 5-11).

The respondent appealed from the decision of January 11th, 1955 by notice of appeal dated and filed the 9th day of February, 1955, within the thirty (30) day period (R. 325). Said respondent appealed from the opinion, decision and order of February 9th, 1955 by notice of appeal dated and filed the 17th day of February, 1955, within the thirty (30) day period from said order (R. 326). Said respondent also appealed from the decree docketed as a judgment on the 11th day of January, 1955 by notice of appeal dated and filed the 24th day of March, 1955, within ninety (90) days from the date of the docketing of the decree as a judgment (R. 391; T. 4). The Court of Appeals reversed the District Court and remanded the cause back

POINT I

The United States District Court did not have jurisdiction over the subject matter for the reason that the libel did not set forth a claim for the enforcement of a maritime contract within the admiralty jurisdiction of the court and that jurisdictional facts for a civil suit were not alleged.

A.

The question arises whether the libel sets forth a cause of action seeking the recovery of passage monies prepaid as consideration under maritime contracts of carriage breached by non-performance, or whether the libel is one for damages by reason of fraud, conversion and misappropriation of funds.

The libel charges that the respondent organized various dummy corporations for the purpose of engaging in fraudulent practices; that the respondent and the various corporations were hopelessly insolvent; that the respondent obtained monies through various acts of fraud and fraudulent representations and used the various corporations to accomplish the fraud and converted the monies so fraudulently obtained to his own use.

There is no allegation in the libel that the respondent entered into a contract with any of the libellants. There is no allegation in the libel showing a diversity of citizenship between the libellants and the respondent or showing that each libellant had a claim for Three Thousand ($3,000.00) Dollars or over. The libel sets forth purely and simply a cause of action in fraud or perhaps in equity to impress a constructive trust. In no event does it set forth a claim for breach of a maritime contract. An analysis of the libel could result only in the statement that it is based upon fraud, fraudulent representations, willful

wrongfully attached and that the respondent had no interest whatsoever in said vessel. Hearings were held before the Honorable Sylvester J. Ryan, United States District Judge (R. 1-187a) and no proof having been offered to establish that Basil Hanioti was the owner of the "S. S. Carmen" or had any interest in the said vessel, individually or through Basile Shipping Co., Inc., which was, in fact, the owner thereof, the Court rendered a decision on the 24th day of September, 1952 in which it held that the Court was without jurisdiction in said suit to issue a writ of foreign attachment and, therefore, dismissed the same (R. 264-269).

Were it not, therefore, for the fact that the respondent, Basil Hanioti, who had not been previously served with the libel, appeared voluntarily, the libel, for all purposes, would have been terminated at the point of the dismissal of the writ of attachment by District Judge Ryan (R. 270). The answer subsequently interposed by the respondent denied all of the material allegations of the libel, including those which alleged that the respondent was doing business under his own name and as the various corporations named therein, and that he owned and controlled the vessel known as the "City of Athens", and the allegation that he was the owner of the vessels "Basile" and "Carmen", and that he was conducting business under the name of Basile Shipping Company, Inc., the record owner of said vessels.

The trial of the suit was scheduled for November 23rd, 1954. Because respondent had not been notified and did not know that the case had been so scheduled, he did not appear, but Frank H. Cooper, Esq., one of the attorneys of record for him, who did appear, permitted an inquest to be taken without making any effort to defend the suit.

The libel was filed on behalf of approximately One Hundred Thirty (130) individuals. It was never verified by the libellants but by the attorney in the alleged absence

of the libellants. During the course of the inquest, the attorney for the libellants did not produce any libellant to give testimony in support of any of the allegations in the libel. Not one libellant was called to testify that he had entered into a contract with the respondent, or that he paid any moneys to the respondent, or that any moneys paid to a third party was in reliance upon representations made by the respondent, or any third person acting at his request, or that any moneys paid to the passenger agent were received by the respondent and converted to his own use. The attorney for the libellants introduced and had marked in evidence transcripts of testimony of the respondent and others in an action *in rem* entitled *Todd Shipyards* v. *City of Athens et al.*, pending in the United States District Court for the District of Maryland, the Commissioner's report in said action and a list of libellants and amounts allegedly paid.

The libellants' attorney then proceeded to inform the Court as to the alleged contents of the voluminous exhibits and stated, among other things, as follows:

(a) That the respondent testified and admitted that the several corporations he had were all dummies;

(b) That he misappropriated the passage monies;

(c) That the list of passengers and the amounts set forth opposite their names, as appended to the libel, were taken from the original records prepared by the treasurer and director of one of the respondent's corporations that was selling the tickets; and

(d) That the list was taken from handwritten documents and was supplied by Mr. Kiernan, the treasurer-director who was in charge of the bookkeeping and accounting work in the passenger agency corporation owned by the respondent.

The exhibits offered are voluminous and extensive. The statements made by Mr. Graham are not supported by the exhibits offered but, on the contrary, show that the respondent did not admit that the different corporations were his dummies or that he misappropriated any passage monies or that his corporations were selling tickets or that he owned the corporation that was the passenger agency.

An analysis of the exhibits offered in evidence by Mr. Graham establishes conclusively that the allegations of the libel are entirely unsupported by the record and no *prima facie* case was presented at the inquest and, secondly, that the respondent had a good and meritorious defense to the libel, which alleges fraud, the obtaining of moneys through fraudulent representations, and/or willful conversion of funds.

The transcript of the testimony disprove Mr. Graham's representations to the Court because it shows that the American Mediterranean Steamship Agency, Inc. was the passenger agent and that all passage monies that were required to be paid before issuance of a passage ticket on the "City of Athens" were received by said corporation which was located in the Borough of Manhattan, City of New York, since early in February, 1947, controlled all of the berthings on the "City of Athens", both east and westbound, publicized the sailings by mail and advertising in travel trade journals, and since their appointment as general passage agent, performed all of these duties which were described in an agency agreement. The exhibits relied upon by the libellants show that the respondent was neither an officer nor a stockholder of said American Mediterranean Steamship Agency, Inc. and that Walter J. Letts, who was produced on behalf of the libellants by Mr. Graham in the Todd Shipyard action testified that he was president of American Mediterranean Steamship Agency, Inc. and that said corporation was owned by World-

N. Travels, Inc.; an organization which is the passage agent for all conference lines and all airlines and doing a general travel business.

The transcript of the minutes taken in the Todd Shipyards Corp. action discloses that the respondent testified that the "S. S. City of Athens" was purchased in 1946 for $430,000 and had been placed with the Todd Shipyards for repairs expected to cost not more than $80,000; that the ship was repaired on two separate occasions; that it had made three round trip voyages and then it was seized by the Todd Shipyards Corp. for the non-payment of a balance claimed to be due for such repairs; that the respondent had been informed at such time that the bills for such repairs would cost up to $750,000; that there had been paid against these bills to Todd Shipyards approximately $270,000 and that over $150,000 of the monies obtained for passenger fares had been paid directly or indirectly to Todd Shipyards on account of said repairs and that the respondent personally never received any part of the passenger fares paid to the American Mediterranean Steamship Agency, Inc.

The analysis of the testimony given by witnesses produced by Mr. Graham, libellants' attorney, at the trial of the Todd Shipyards action in Baltimore and offered in evidence as exhibits at the inquest in the case at bar shows that there was no misrepresentation of any fact in the solicitation by the passenger agent; that the solicitation was not made with the intent to defraud the passengers and that neither the passenger agent nor the respondent nor the owners of the "S. S. City of Athens" at the time when the passenger agent was hired or at the time that they publicized by mail and advertising the schedules for the sailings of the City of Athens knew or could have known that the Todd Shipyards intended to or would seize the vessel, City of Athens, so as to prevent the sailing. The proof

to the contrary is that the City of Athens was purchased for a substantial amount of money in 1946; that it did make three round trip voyages in accordance with its advertising; that it did place the ship for repairs with Todd Shipyards; that repairs were made; that the principals had never expected that the amount chargeable for such repairs could possibly reach the amounts claimed by Todd Shipyards; that $270,000 had been paid on account of these repairs and at least $150,000 came from monies collected from passenger agents.[2]

The District Judge, apparently relying upon the representations made by Mr. Graham as to the contents of these exhibits, entered a default decree on the 6th day of December, 1954, against the respondent requiring him to pay to the libellants the sum of One Hundred Thirty Thousand, Three Hundred Eighty-three and 69/100 ($130,383.69) Dollars. The decree also contained a provision that, unless it was satisfied within ten (10) days from the date of service upon the respondent's attorneys, with notice of entry thereof, and unless execution thereunder was stayed by an appeal with proper and approved security thereon within the ten (10) day period, the Clerk of the District Court was directed to issue to the United States Marshal a writ of attachment against the person of the respondent.

On the 7th day of December, 1954, the respondent, acting through a new attorney, obtained an order to show cause to vacate the default decree and to enjoin the enforcement of the body execution (R. 299-315a). In support of said motion, the respondent urged (a) that the default was not willful or deliberate and that the libellants were not entitled to enter a default judgment; (b) that the libellants failed to offer evidence at the inquest before the District Court sufficient to make out a *prima facie* case and

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[2] The testimony in support of the statements herein made is set out *infra* under Point II.

to the District Court for dismissal for lack of admiralty jurisdiction.

The Court of Appeals, in a unanimous opinion written by Circuit Judge Medina, stated that the record presents a maze of complications, procedural and otherwise, and of the various points raised it was necessary to discuss but one since they had concluded that there was no jurisdiction in admiralty. Although the Court of Appeals recognized that the contract for the transportation of passengers by sea is a maritime contract and a suit for its enforcement would plainly be within the admiralty jurisdiction of the District Court, it held that the libel in the case at bar sets forth no such claim. The Court of Appeals stated that the claim is in the nature of the old common law *indebitatus assumpsit* for money had and received based upon the wrongful withholding of monies by respondent on the theory that in equity and good conscience he is under a duty to pay them over to libellants, but if the libel is viewed as stating a claim based upon tortious conduct in the nature of fraud as seems to have been the intent of the pleader, the case against admiralty jurisdiction is even clearer (T. 1-3).

The reversal by the Court of Appeals was clearly based upon the finding that the libel stated a claim alleging fraud which was not within the admiralty jurisdiction of the Court and did not determine the various points raised and the maze of complications, procedural and otherwise, which the record presented. This Court granted certiorari and permitted the libellants to proceed upon a printed part of the record which touched only upon the question of jurisdiction.

The notices of appeal from the orders denying the motion to set aside the default decree are not included in the printed record and the attorney for the libellants studiously avoids mentioning, in his brief, that respondent had filed said notices of appeal.

conversion and wilful misuse of funds all interwoven into one cause of action.

Circuit Judge Medina recognized the principle of law that a contract for transportation of passengers is a maritime contract and that a suit for its enforcement would be within the admiralty jurisdiction of the District Court, but stated that the libel in the case at bar sets forth no such claim.

A case in point is *Kaufman et al. v. John Block & Co. Inc. et al.*, 60 Fed. Supp. 992. There the libel contained two causes of action. The first cause of action alleged a breach of contract to carry goods by sea and was within the admiralty jurisdiction of the court. The second cause of action alleged that the principal was a wholly fictitious corporation and that the respondents knew it was a wholly fictitious corporation which was not the charterer or operator of the "Marie Anna" or any other vessel; that the respondents represented themselves as officers, directors and agents for the "Marie Anna" and used fictitious names in so holding themselves; that the respondents knew or should have known that the vessel "Marie Anna" was a yacht, prohibited from carrying cargo for hire, etc.; that the checks by which the libellants prepaid the freight were cashed by the Marie Anna, Inc., through a checking service after a resolution of the corporation had been passed authorizing the service to cash the corporation's checks and the respondents retained the moneys received from the checks, and the libellants thereby suffered damages. The District Court, with respect to the second cause of action, stated, at page 993, as follows:

> "This cause of action is either for moneys had and received or for fraud. In either event, it is not maritime but a pure common law action. This court's admiralty jurisdiction does not extend to any suit not maritime. Rea v. The 'Eclipse', 135

U. S. 599; 10 S. Ct. 873, 34 L. Ed. 269; nor can non-admiralty causes of action be joined to admiralty ones. Westfall Larson & Co. v. Allman-Hubble Tug Boat Co., 9 Cir., 73 F. 2d 200; The Yankee, D. C., 17 F. Supp. 512, 513.

Giving full faith and credit to the allegations of the second cause of action in the libel, it seems to me that the charge set forth is one of obtaining money under false and fraudulent representations; a common law action. True, the artifice used is a bill of lading but this cause of action has not to do with the bill of lading but with the obtaining of money by fraud."

A cause of action charging fraud and deceit and falsely representing corporate power in a corporation to make an alleged guarantee of demurrage in the event a certain vessel fails to clear the port of loading within the free time allotted to the shipper is not within admiralty jurisdiction and another cause of action for breach of an individual representation and warranty that the said guarantee was the full act and deed of the corporation would not bring it within the jurisdiction of the admiralty court. *Black Sea States S S Line v. Association of International Trade Dist. 1, Inc., et al.*, 95 Fed. Supp. 180.

In *Home Insurance Co. v. Merchants Transportation Co.*, 12 Fed. 2d 931, aff'd 16 Fed. 2d 372, C. C. A. 9, a libel was filed in admiralty to recover marine insurance payments made allegedly upon misrepresentations of defendant. The Court found that the issue presented was not maritime stating:

"So in the present case, before any question of maritime law can arise or be considered, libellant must first establish that it parted with the money sought to be recovered relying upon misrepresentations made by respondent. This fact ousts the admiralty jurisdiction" (p. 932).

In *Williams v. Providence Washington Insurance Co.*, 56 Fed. 159 (D. C. S. D. N. Y.), a libel was filed to recover under a policy of insurance issued by the respondent against perils of the sea. The boat was damaged by sea perils in Long Island Sound, at a dock at Stamford, Conn. The policy was accepted and a premium paid in reliance upon certain representations which were false and fraudulent when made. The libellant claimed that since it complied with the conditions of the policy it was entitled to recover damages in the amount of the loss. Exceptions were filed to the libel for lack of jurisdiction of the cause of action stated in the libel. The Court, in sustaining the exceptions to the jurisdiction stated, at page 160, as follows:

> "* * * The complaint is, in fact, an action for false and fraudulent representations, by which the libelant was induced to accept the policy, supposing that he was insured for the Sound, when he was not. Such an action is not upon the policy itself, but upon the negotiations leading to it. It is not brought like The Electron, 48 Fed. Rep. 689, for any misrepresentations in the policy or for damages in the execution of the policy. The representations here are no part of the contract, but outside of it, and anterior, or preliminary to the contract, and as such not properly maritime."

In the case of *Commercial Trust Co. v. United States Shipping Board E. F. Corp.*, 48 Fed. 2d 113, C. A. 2, the Court stated with respect to suits brought in admiralty to recover money obtained by fraud on maritime contracts:

> "As the reasons which made it unlawful for him to retain the proceeds were non-maritime, the obligor failed."

In the case at bar, there is one cause of action alleging fraud, false representation and wilful conversion. The libellants, in their memorandum, contend that the cases of

Silva v. *Bankers Commercial Corp.*, 163 Fed. 2d 602 and *United Transportation and L. Co.* v. *N. Y. & Baltimore T. Lines*, 185 Fed. 386, have been repudiated as authority in the *Sword Line Inc.* v. *United States*, Docket No. 23723, decided December 14, 1955 and not yet reported. Although the Court of Appeals cited the *Silva* and the *United Transportation* cases as authority for denying admiralty jurisdiction where the suit is for money had and received, the decision rests mainly upon its statement *that if the libel is viewed as a claim based upon tortious conduct in the nature of fraud, the case against admiralty jurisdiction is even clearer.*

The libellants, in their brief, state that *Silva* v. *Bankers Commercial Corporation*, cited *supra*, and *United Transportation & L. Co.* v. *N. Y. & Balt. T. Lines*, cited *supra*, appear to have been repudiated as authority during the pendency of this cause before this Court, by the same Court of Appeals, with a different bench in *Sword Lines Inc.* v. *United States*, *supra*. That action concerned an overpayment of charter hire. Circuit Judge Learned Hand, in the *Sword Line* case, in referring to the holding of the Supreme Court in the *Krauss Bros. Lumber Co.* case, cited *infra*, stated in part as follows:

> "It assumed that the goods had been delivered, and put its decision upon the premise that the carrier had promised, not only to deliver the goods for the agreed hire but thereafter not to demand anything further; and such a demand, if it was indeed a breach of the maritime contract, was of course cognizable in the admiralty. Having so interpreted the contract, the Court did not find it necessary to decide whether a claim in quasi contract, based upon an unjust exaction after the contract had been completely performed, was also cognizable in the admiralty. For my own interpretation of the decision, I rely upon what Stone, J., said on Page 124, which is all there is on the point: 'Even under the common

> law form of action for money had and received, there could be no recovery without breach of the contract involved in demanding the payment, and the basis of recovery there as in admiralty, is the violation of some term in the contract of affreightment whether by failure to carry or by exaction of freight which the contract did not authorize.' My brothers do not agree with such a limited understanding of the decision; they think that it should be read so as to cover claim in quasi contract; but under either understanding it is clear that the District Court had jurisdiction over the suit at bar."

In the *Sword Line* case the issue of admiralty jurisdiction was neither briefed nor argued. Indeed, the suit was brought in admiralty and, upon appeal, the Government's brief stated that the parties were in agreement that jurisdiction lay in admiralty but that, since jurisdiction could not be conferred by consent, it was for the Court to determine whether it had jurisdiction. The Government's brief was served ten days before argument and the libellant did not brief the jurisdictional point. The decision of the same circuit in this case was not called to the attention of the Court and the libellant, on January 19, 1956, filed a petition for rehearing urging, *inter alia*, that the *Sword Line* decision was in conflict with the decision in this case.

Moreover, *Sword Line* involved no question of fraud and no prayer for equitable relief. It arose from the charter by the Government to Sword Line, pursuant to Section 5 of the Merchants Ship Sales Act of 1946, 50 U. S. C. App. 1738, of a group of vessels. Section 709 (a) of the Merchant Marine Act, 1936, 46 U. S. C. 1199(a), which was expressly made applicable to this and other charters, provided that the Government was to be paid fifty percent of the profits as additional charter hire. Nevertheless, the charter provided for and the Government demanded a share of the profits at rates of fifty, seventy-five and ninety percent. The libellant alleged that the charter violated

the statute and recovery was sought for the alleged overpayments.

Judge Learned Hand wrote the opinion, with which he disagreed in part. Treating the suit as one for moneys had and received in quasi contract, by which the parties were deemed to have agreed (contrary to the express terms of the charter) that additional charter hire should be at the rate prescribed by statute, the Court concluded that the *Krauss Bros. Lumber Co.* v. *Dimon S. S. Corp.*, 290 U. S. 117, was controlling, although there was disagreement as to how far that decision went.

In the *Krauss* case a shipper had agreed to pay a water carrier a rate of $10 per thousand feet for transportation of lumber with an express proviso that if a regular carrier charged a lower rate for similar cargo the lower rate should apply. The carrier demanded and received the rate of $10. But a rate of $8.50 had been charged by a regular carrier and the shipper demanded and was refused refund of the difference. The Supreme Court held that even as an action for money had and received it was cognizable in admiralty since it was *based upon breach of an express maritime contract.*

United Transportation involved a claim for relief against a *fraudulent contract* made by a common officer of both parties. There the Court cited *Suffolk Bank* v. *Lincoln Bank*, 3 Mason, 1, 16, 17, Fed. Cas. No. 13,590, in which Judge Story said "They (courts of admiralty) cannot * * * grant relief against a fraud" and the Second Circuit went on to say:

> "The fundamental question is whether the general manager of the respondent corporation induced by his interest in the libellant corporation betrayed his trust. But this question is not maritime in its nature" (185 Fed. at 391).

It is a fact, moreover, that although the *United Transportation* case was cited by the respondent in its brief in the *Krauss* case the *Krauss* opinion did not refer to it.

The *Silva* case was an action at law by a shipper against a finance company which had been financing the carrier and to which the carrier had paid freight money received from the shipper for a voyage that was abandoned. There was no contract, maritime or otherwise, between the shipper and the finance company. Rejecting the defendant's argument that the suit was maritime and governed by the rules of admiralty, Judge Augustus Hand said:

> "The plaintiff's claim is based on the assumption that *the maritime contract upon which the freight moneys were paid was rescinded* and that the defendant ought, in equity and good conscience, to return to them an equivalent amount with interest because it received the freight moneys knowing that they were paid for a voyage that was abandoned * * *" (163 Fed. [2d] at 604) (emphasis writer's).

The *Krauss* case, as we read it, is authority for the proposition that an action for money had and received in breach of a maritime contract is cognizable in admiralty. It does not hold that admiralty has jurisdiction of an action for fraud, as in *United Transportation*, or of an action against the recipient of funds who was not a party to a maritime contract, as in *Silva*. The case at bar is analogous to both these cases and has nothing in common with *Sword Line*. It would be carrying *Sword Line* and *Krauss* far beyond the reasonable limits of their own logic to suggest that they have any significant bearing upon *United Transportation* or *Silva* as precedents within the framework of the case at bar. Whatever the holding may be as to admiralty jurisdiction to actions for money had and

received, there is no authoritative precedent for the suggestion that an action for fraud is cognizable in admiralty.

In the cases which allege a violation of some term of the contract, the basis for the action is found in the admiralty contract and that determines the question of jurisdiction. But in the case at bar the claim is one for fraud and misrepresentation. The fact that the money obtained through alleged fraud and fraudulent representations was for a passage does not change the true nature of the action, which is to recover damages for fraud and false representations.

We submit that no matter whether the interpretation of the *Krauss* decision is expanded to give admiralty jurisdiction to an action for money had and received based upon an implied promise to repay moneys paid in excess of the stipulated freight, it cannot and should not be interpreted to hold that admiralty has jurisdiction of an action to recover damages for moneys paid through fraud and fraudulent representations. Particularly must this be so where, as in the case at bar, *the libellants seek the remedies of arrest to enforce the payment of a claim based upon fraud, because in a civil action the defendant would be entitled to a trial by jury of the issues as to whether or not the respondent did commit such fraud, whereas in admiralty, the respondent would be deprived of the rights afforded him by the Constitution in a civil action on the law side of the Court.*

The attorney for the libellants recognized that the Federal Court did not have admiralty jurisdiction as evidenced by other proceedings and actions brought by him on behalf of the same libellants to recover the same monies sought in the admiralty suit.

On December 15, 1947, the libellants represented by Mr. Graham and acting through him instituted an action in

the United States District Court for the Southern District of New York against Todd Shipyards Corporation. The complaint in that case alleged that it was a group action pursuant to Rules 18, 19, 20 and 23 of the Rules of Civil Procedure; that the plaintiffs had paid the passenger agent for the "SS City of Athens", for the July 15, 1947 sailing, the sum of $130,022.69; that the moneys were paid to the defendant, Todd Shipyards Corporation, and that said moneys were appropriated to the use of the Todd Shipyards Corporation. The complaint also alleges that on July 12, 1947 the "SS City of Athens" was seized by Todd Shipyards Corporation, and on July 14th the said corporation filed a libel against said "SS City of Athens" on a writ of foreign attachment against the moneys in the hands of the general passenger agents.

By the allegations of said complaint it was shown that Mr. Graham knew about the repairs to the ship "SS City of Athens"; knew of the very substantial charges that were made by Todd Shipyards Corporation for these repairs; knew of the fact that the moneys for the passages were paid to the general passenger agent; knew that these moneys were turned over to Todd Shipyards Corporation in part payment of these invoices; knew that Todd Shipyards Corporation seized the vessel before the date of sailing and knew that it had attached all moneys in the hands of the general passenger agent. These allegations in the said action contradict the allegations made in the libel in the case at bar of any fraud or application of the moneys collected from the passengers for the sailing to Hanioti's own use.

The Todd Shipyards Corp. appeared in the said action and interposed an answer alleging that the Federal Court was without jurisdiction; that no proper cause of action was alleged and that the relief sought was the same relief as in the action pending in the United States District Court

for the District of Maryland entitled "Todd Shipyards Corporation against The City of Athens, et al.," Civil Action No. 44-323, in which the plaintiffs in said action had intervened; and that thereafter, upon motion of the defendant, District Judge Bright dismissed the complaint as to all plaintiffs except Archawski for failure to allege the jurisdictional amount, with prejudice. In other words, the Court determined that each plaintiff has a separate cause of action and each plaintiff was required to allege the jurisdictional amount to institute a suit. The claims of the plaintiffs could not be considered as a whole but had to be considered separately. This action was finally dismissed with prejudice by Senior Judge John C. Knox for failure to post a bond as security for costs by reason of the fact that Archawski was a non-resident.

Thereafter, the libellants instituted an action against respondent and the Todd Shipyards and others in the Municipal Court of the City of New York, Borough of Manhattan, First District, in an action for fraud or injury to property. A motion was made by Todd Shipyards Corporation and A. J. Armstrong Company, Inc. to dismiss the complaint for lack of jurisdiction and the motion was granted in the Municipal Court. An appeal was taken to the Appellate Term and the Appellate Term of the Supreme Court, First Department, in *Acker, et al.* v. *Hanioti, et al.*, stated in a decision reported in 89 N. Y. S. 2d-885, at page 886, as follows:

> "Despite the joinder of all the claims which involved common questions of fact and law, each plaintiff's claim was nevertheless a separate claim. Therefore, the jurisdictional limitation on amount was not exceeded. Vigil v. Cayuga Construction Corp., 185 Misc. 675, 54 N. Y. S. 2d 94, affirmed 185 Misc. 680, 55 N. Y. S. 2d 909, affirmed 269 App. Div. 934, 58 N. Y. S. 2d 343. The subject matter as an action for fraud or injury to property was within the jurisdiction of the Municipal Court. The notice

> of motion having been directed to the complaint generally the sufficiency of any cause of action will defeat the motion. Advance Music Corp. v. American Tobacco Co., 296 N. Y. 79, 84, 70 N. E. 2d 401, 403. The fourth and seventh causes of action are clearly sufficient."

Although the Appellate Term held that the complaint stated a good cause of action for fraud and was therefore within the jurisdiction of the Municipal Court, the Appellate Division of the Supreme Court, First Department, dismissed the complaint upon other grounds, namely, that the action was one in equity and, in an opinion reported in 276 App. Div. 78, 92 N. Y. Supp. 2d 914, discussed the nature of the action and stated, at page 915, as follows:

> "* * * Three hundred ten plaintiffs are suing for the return of money paid to purchase passage on the SS City of Athens for transatlantic voyages which were not made by said vessel. This ship was owned by a Panamanian corporation known as Sociedad Naviera Transatlantica S. A. Said corporation is alleged to have been indebted to Todd *and Armstrong. It is further alleged that moneys* procured by Sociedad Naviera Transatlantica, S. A. from plaintiffs for passage, though unearned, were paid out to the accounts of Todd and Armstrong by reason of such indebtedness. On July 12, 1947, the City of Athens was libeled by Todd in the Port of Baltimore, Maryland, by process in rem issued out of the United States District Court, with the consequence that the scheduled voyage of July 15, 1947, and all later voyages were abandoned."

and again at page 916 stated as follows:

> "* * * Money paid for passage on ships for voyages which were not undertaken form constructive trust funds for the benefit of the prospective passengers. Where, as here, if the allegations of the complaint be correct, such funds have been transferred to creditors of the transportation company, with notice

of these facts, the recipients are held accountable in equity. * * *

"Matters of this nature are cognizable in equity rather than at law. 54 Am. Jur. Trusts, sec. 248; Bogert on Trusts, 2d Ed., S. 49, page 170; Pomeroy Equity Jurisprudence, vol. 5, sec. 10; Newton v. Porter, 69 N. Y. 133, 138-140, 25 Am. Rep. 152."

B.

It is argued by the libellants that the allegations and proofs respecting the respondent alleging fraudulent machinations are ancillary to and do not change the nature of the action, citing *Swift & Co. Packers et al.* v. *Companie Colombiana Del Caribe*, 339 U. S. 684. What this argument overlooks is that in the case at bar there is no independent maritime issue cognizable in admiralty to which the alleged fraud is ancillary.

The basic rule is that admiralty is without jurisdiction of an action for fraud. *Kaufman et al.* v. *John Block Sea States S. S. Line* v. *Association of International Dist. 1, Inc., et al.*; *Home Insurance Co.* v. *Merchants Transportation Co.*; *Williams* v. *Providence Washington Insurance Co.*; *Commercial Trust Co.* v. *U. S. Shipping Board E. F. Corp.*; *United Transportation and L. Co.* v. *N. Y. & Baltimore T. Lines*; all *supra*. This rule, like most, is subject to exception. Thus, where there is an independent maritime claim admiralty will not divest itself of jurisdiction of an incidental claim for fraud. That was the holding in the *Swift* case.

There an action in admiralty was commenced upon a libel *in personam* for loss of cargo accompanied by a prayer for foreign attachment. The libel was filed on March 7th, 1948, and on the next day a supplemental and amended libel was filed and on the basis of certain allegations to the effect that a transfer was made of the Alacran to another corporation which was named in the supplemental complaint in

fraud of the rights of libellants without consideration. The Court held that the relief seeking to set aside the transfer as fraudulent is only an incident of an admiralty claim arising upon a contract of affreightment supplemented by the charges of negligence in the non-delivery of a sea cargo, matters obviously within the admiralty jurisdiction and that the allegation of a fraudulent transfer is a subsidiary or derivative issue in the litigation and, therefore, the Court of admiralty did have jurisdiction. The Court, however, stated at page 865, as follows:

> "Unquestionably a court of admiralty will not enforce an independent equitable claim merely because it pertains to maritime property. E. G. v. Eclipse, 135 U. S. 599, 608, 10 S. Ct. 873, 875, 34 L. Ed. 269 and cases cited."

In the case at bar, the charge of obtaining moneys through fraud and fraudulent representations and willful conversion are not incidents of a cause of action in admiralty, it is the cause of action itself. Since fraud is the sole issue in this case it falls within the class of cases subject to the basic rule that admiralty is without jurisdiction and the exception exemplified by the *Swift* case is wholly inapplicable.

C.

The libellants argue that after the proofs are in, jurisdiction of the subject matter in admiralty is determined by the proofs as reconciled to the libel and amendment would be allowed of any technical defective allegations.

In the first place, the libellants lose sight of the fact that there was no trial as such, but only an inquest where not one witness testified but reliance was placed upon transcripts of voluminous testimony in an action *in rem* pending in the United States District Court in Baltimore, Mary-

land, where libellants intervened to establish claims against the "S. S. City of Athens". The transcripts of evidence were offered in evidence en masse, and so marked, even though it is plain that the District Judge did not have an opportunity to read the said evidence to determine whether the same was admissible, relevant or intended to prove any allegations of the libel.

Secondly, no amendment was proposed by the libellants in the District Court or the Court of Appeals and it is not suggested even in the libellants' brief in this Court as to how the libel would or could be amended to sustain an action against the respondent in admiralty.

The fact is that the exhibits in evidence do not sustain the allegations of the libel as pleaded, nor would they sustain any amended allegations if those allegations were framed to present a cause of action over which the District Court would have admiralty jurisdiction.

The libellants' cause of action determines jurisdiction. Jurisdiction is established by how a claim is presented and it is the libellants' pleading that is determinative. *Eastport Steamship Co.* v. *United States*, 130 Fed. Supp. 333 (1955).

In *Peyton* v. *Railway Express Agency*, 316 U. S. 350, the Court at page 353 stated:

> "Whether a suit arises under a law of the United States must appear from the plaintiff's pleading. * * *"

POINT II

The respondent was entitled to a dismissal of the libel even after inquest because the libellants failed to make out a *prima facie* case.

The libel was not verified by any of the libellants but was verified by the attorney, alleging that none of the libellants were available in New York.

Said libel first endeavors to allege an action for fraud.

The five elements of a fraud action which must be established by the plaintiff are representation, falsity, deception, scienter and injury. *Hackner* v. *Morgan* (C. C. A. 2d Cir.), 130 Fed. (2d) 300, affirming *Eastman* v. *Morgan*, 43 Fed. Supp. 637, cert. den. *Eastman* v. *Guaranty Trust Company of New York*, 63 Sup. Ct. 266, 317 U. S. 691.

To put it another way, to support an action for fraud, the plaintiff must establish that the defendant must have made a substantial material representation, it must have been false when defendant made it; he must have known that it was false and it was made with the intention of inducing plaintiff to act thereupon; and plaintiff must have been misled and in reliance thereon did act upon it and suffered damages. *E. M. Fleischmann Lumber Corporation* v. *Resources Corporation Intern.*, 105 Fed. Supp. 681; *United States* v. *U. S. Cartridge Company*, 95 Fed. Supp. 384, aff'd 198 Fed. (2d) 456, cert. den. 73 Sup. Ct. 645, 345 U. S. 910; *Russo* v. *Sofia Brothers*, 2 F. R. D. 80.

The burden was upon the libellants to establish that the corporation which owned the "SS City of Athens" was formed by the respondent and that said corporation was his *alter ego*; that he was the owner of the American Mediterranean Agency, Inc., and that the latter was also his *alter ego* and created by him; that the moneys paid by

the libellants were collected for the respondent's account, were turned over to him and wrongfully and deliberately applied to his own use and benefit; and that the respondent manipulated his assets for the purpose of defrauding the libellants. Unless the libellants establish these facts they could not be entitled to a decree even if the Court should find that the District Court had admiralty jurisdiction.

During the course of the inquest the attorney for the libellants did not produce any libellant to give testimony in support of any allegation of the libel, or to state that they paid any moneys in reliance upon a certain advertisement, or to establish the manner in which and to whom the moneys were paid. No contracts were introduced or offered in evidence. The attorney for the libellants relied solely upon documentary evidence consisting of voluminous testimony which had been given in a prior proceeding in the District Court of Maryland in a *rem* action brought by the Todd Shipyards, Inc. against the "SS City of Athens". Said exhibits are part of the record in this case and the Court will observe that they consist of thousands of pages of testimony. The District Court in the case at bar, after an inquest, the full report of which is contained in only seven printed pages, stated, from the bench "All right, decree for the libellant". Obviously he could not possibly have read the minutes but relied upon the statements of libellants' counsel as to what said minutes contained. The only part of said minutes with which we are concerned is the testimony of the respondent in said proceeding.

The respondent was called as a witness on behalf of the present libellants, who were intervenors in the Baltimore proceedings. The theory of the intervenors was that Todd Shipyards, Inc., the libellant in the Baltimore proceedings, had received the passage moneys with full knowledge of the fact that they were not earned. The inter-

venors, the present libellants, relied upon the testimony of the respondent to support their theory. The testimony in this respect may be succinctly summarized as follows:

The respondent testified with regard to the purchase of the ship "City of Athens" as follows:

> "Q. When did Sociedad acquire the SS City of Athens? A. October 1946.
> Q. From whom was it purchased? A. Ishrandtsen Company.
>
> Mr. Williams: Did he say what date in October or just October?
> Mr. Graham: Just October.
>
> Q. What did you pay for it? A. I think $430,000.00 or $435,000" (p. 1148, Vols. 11 and 12).

He further testified that after the ship was purchased they decided to make certain repairs and in that respect testified as follows:

> "* * * A. When we bought the City of Athens the name of the ship was the Ville D'Anvers, we decided to do some repairs on that ship and Mr. K. Gratzos recommended to put the ship into Todd Shipyard. He made all the arrangements, and when we bought the ship, it went directly to the Todd Shipyard in Brooklyn.
> Mr. Gratzos was an expert in shipping business all his life. He told me that the repairs that were intended to go on that ship, they would never exceed $80,000. We took the ship into the Todd Shipyards. It was on Saturday afternoon and Monday morning they started work on that ship. Mr. Gratzos, he appoints a supervisor, Mr. Harry Williams" (p. 1149 of Vols. 11 and 12).

He further testified as to the number of voyages made by the "City of Athens", the charges for repairs and the payments made on account of said repairs as follows:

> "* * * A. That will take a little time to have the underwriters agree to the exact amount. That time

the ship has been delayed on account of the heavy water damage about a month, I think exactly 29 days. The ship sailed again for the second time by the end of January. Then it got back sometime in March. Then it sailed again and got back again sometime in May. All this time it was tremendous pressure from the Todd Shipyards for money. We gave them about, I think about $170,000. additional money.

Q. Where did you get that? A. Passengers' money. I think I should say what happened before we get to that account of the Todd Shipyards. Sometime in December we received a bill from the Todd Shipyards in which they claim about $600,000. for repairs on that ship—in all $600,000.

Q. What was the date of that? A. Sometime in December, 1946. I was very much disturbed about those charges and I went down and I saw my architect, Mr. Phillip Rhodes. Mr. Rhodes called Mr. Stehr.

Q. Who is Mr. Stehr? A. Associate or assistant to Mr. Rhodes. I gave to him the bill which has been rendered to me from Todd Shipyards. Mr. Stehr and Mr. Rhodes couldn't believe that the repairs on that ship can be $600,000. Both of them, they say it is impossible for the repairs which they do to that ship to run as high as $600,000.

* * *

Mr. Graham: Will you read the last sentence of the witness' answer?

(Answer repeated by stenographer.)

Witness: Then Mr. Stehr called Harry Williams and he makes an appointment with him. I was insisting on going to the Todd Shipyards then after I heard the story to find out why they charged me $600,000 when the work should never exceed what was done on the ship $200,000. We went out, Mr. Stehr, Mr. Harry Williams and myself, went out to Brooklyn to the Todd Shipyard and we spent one whole afternoon down there". (pp. 1154, 1155 and 1158 of Vols. 11 and 12).

* * *

"*By Mr. Graham*:

Q. Did Mr. Williams ever apprise you of the extent of these bills as they progressed from time to time? A. No, I approached him and I told him 'I hear the bills run too high' and he told me 'They are crazy. Don't listen to irresponsible persons. I know this work. It will cost nothing what they say.' When we beat on that ship the alterations cost $600,000, $700,000 or $750,000, the final bill, everybody was surprised. They couldn't believe it." (p. 1185 of Vols. 11 and 12).

* * *

"Q. Who was the American Mediterranean Ageney, Inc.? A. The ticket agency, the passenger money.

Q. Did the American Mediterranean Steamship Agency have anything to do with the solicitation of cargo or receive the cargo money? A. No, only passengers.

Q. At any time? A. At no time" (p. 1191 of Vols. 11 and 12).

* * *

"Q. Did Sociedad ever receive any moneys from the American Mediterranean Steamship Agency? A. Yes.

Q. Approximately how much money?

By the Commissioner:

Q. That is from passenger fares? A. I think we got over $150,000.

By Mr. Graham:

Q. What was done with the money? A. It was paid to Todd directly or indirectly.

Q. Did Sociedad receive any money from any other source whatever outside of American Mediterranean Steamship Agency, Inc.? A. I don't think so."

* * *

"Q. During the time Todd was demanding money did they demand the passenger monies? A. Yes. Mr. Riordan said 'Where is the passenger monies?'

Mr. Varian: I object. He put the answer in the witness' mouth.

X. Mr. Commissioner, that is the honest God's truth." (pp. 1193, 1194 of Vols. 11 and 12).

* * *

"Q. Do you know whether the American Mediterranean Steamship Agency, Inc., received additional moneys from time to time on account of passage? A. Of course.

Q. But you don't know when it received it or how much was received? A. No.

Q. Speak for yourself personally? A. He used to call me on the phone once in a while and give me a report of it.

Q. How much of that money, if any at all, was ever turned over to you personally by Mr. Letts? A. To me personally as Basil Hanioti?

Q. Yes, as Basil Hanioti? A. Nothing" (p. 1252 of Vols. 11 and 12).

The present libellants' claims were dismissed in the Baltimore proceeding on the ground that the Court had no jurisdiction to entertain their claims. The Court held that their claims, if established, constituted in personam claims and not claims against the ship and therefore could not be entertained in the Baltimore proceedings, which was purely in rem.

It is submitted that there is no testimony in the Baltimore proceeding which justifies any finding that the respondent committed any of the frauds attributed to him in the libel in the instant case or any other fraud. If it be contended that the libellants are not bound by the respondent's testimony in the Baltimore proceeding, although, they vouched for his credibility in calling him as their witness, this would justify only a rejection of his testimony if it were to be disbelieved. This did not take the place of the necessary affirmative evidence to establish proof of the requisite fraudulent acts.

If the testimony of other witnesses in the Baltimore proceeding offered in evidence in the instant case were to be considered, reference being made especially to that of Walter J. Letts, it is submitted that such testimony, rather than supporting the libellants' contentions that the respondent formed, owned or controlled the American Mediterranean Steamship Agency, Inc., disproves such allegation.

Walter J. Letts, who was produced on behalf of the various passenger claims represented by Mr. Graham and Mr. Hillman, testified as follows:

"Q. Mr. Letts, are you connected with the American Mediterranean Steamship Agency, Inc.? A. Yes.

Q. In what capacity and for how long have you been so connected? A. Since its inception and as President.

Q. When and where was the American Mediterranean Steamship Agency, Incorporated, organized? A. It was registered under the Assumed Names Act in New York City in early February while awaiting incorporation, which I think went through in New York on the 27th day of February, 1947 (p. 716 of Vol. 6).

Q. Where is the American Mediterranean Steamship Agency, Inc.'s principal place of business located and how long has it been such? A. At 11 West 42nd Street in New York City and its inception in early February" (p. 717 of Vol. 6).

* * *

"Q. Mr. Letts, I hand you Passenger Exhibit 4 for Identification and ask you what it is. A. It is the contract between our agency as passenger agents and the Sociedad Naviera, who owned the City of Athens."

* * *

"Q. Will you please describe your firm's duty with respect to its capacity as general passenger agents? A. We controlled all of the berthings on the City of Athens, both east and westbound. When I say westbound, that means from the Mediterranean area to New York, as well as the space from New York into the Mediterranean area. We publicized it by mail and advertising in the travel trade journals and mail

campaigns, sending them various schedules, rate structures and the sale of the tickets through the 1,800 odd agents throughout the United States.

Q. Can you describe the City of Athens as to the type of vessel, the nature of trade which she was engaged in and her general carriage? A. She carried approximately 200 passengers and freight into the Mediterranean area.

Q. Since your firm's appointment as general passenger agent, have you performed the duties as you have outlined and as has been incorporated in this agency agreement? A. We did.

Q. Will you please describe the mechanics of such advertising and promotional work, such as material used and requirements in order to secure space? A. Direct mail campaigns to the various agents building up the type of accommodations that were available, the prices that were being charged and, as I said, through advertising in the trade journals among the agents in the agency business.

Q. Was it a prerequisite to the issuance of a passenger ticket that the passage money be prepaid? A. It was.

Q. In your advertising and promotion, did your firm disclose who the owners of this vessel were to the potential passengers? A. No, we were never called on nor did we deem it necessary.

Q. Were all passage monies that were required to be paid before the issuance of a passage ticket received by your firm? A. Yes, all monies were received by us before a ticket was issued" (pp. 718, 719 and 720 of Vol. 6).

* * *

"A. The American Mediterranean Steamship Agency, Inc., no. It was a separate corporation owned by ourselves. When I say ourselves, I mean World Travels, Inc." (pp. 762 and 763 of Vol. 6).

* * * * * * *

"Q. It has been testified here before on the Todd claim with respect to an organization called World Travels, Inc.—and I made the statement here that I would have you present to clear up that matter—tell

us just who World Travels is? A. The first part of your question was what?"

* * *

"A. World Travels is an organization of which I am President, who are passenger agents for all conference lines and all air lines and doing a general travel business.

Q. That is all in connection with that. What is your title in World Travels? A. President.

Q. On June 13th, what was your title? A. On June 13th, President.

Q. On June 13th, did you pay to Todd Shipyards through World Travels the sum of $10,000 by check? A. I did, with a World Travels check" (pp. 784 and 785 of said Vol. 6).

The testimony shows that the American Mediterranean Steamship Agency, Inc., was the passenger agent and that all passenger moneys were received by said corporation since early in February, 1947, and that the respondent was neither an officer of said corporation, nor a stockholder, but, on the other hand, that Walter J. Letts was President and that said corporation was owned by World Travels, Inc., of which Walter J. Letts was also President.

On the basis of the record the libel should have been dismissed at the conclusion of the inquest because there was no evidence of false representation, fraud, or conversion on the part of the respondent.

Since the respondent Hanioti filed an answer placing in issue all of the material allegations of the libel, the burden was on the libellants to establish the allegations of the libel, even though he had failed to appear at the trial.

A case directly in point is *Bass* v. *Hoagland*, 172 Fed. (2d) 205, wherein the Court, at page 210, stated as follows:

"* * * When Bass by his attorney filed a denial of the plaintiff's case neither the clerk nor the judge

could enter a default against him. The burden of proof was put on the plaintiff in any trial. When neither Bass nor his attorney appeared at the trial, no fault was generated; the case was not confessed. The plaintiff might proceed, but he would have to prove his case."

POINT III

The entry of a default judgment against the respondent violated his legal rights and the refusal to set aside said judgment, after motion, constituted an abuse of discretion by the District Judge.

A.

Frank H. Cooper, Esq., one of the attorneys of record who filed the answer on behalf of the appellant, appeared before the Trial Court and stated that he did not know where the respondent was and that the last he heard of the respondent the latter was supposed to be in London and that he did not know when the respondent was coming back. Mr. Cooper did not state or indicate that he had sent any notices to the respondent advising him of the date fixed for the trial of the action. Mr. Cooper's statement indicated that he did not advise the appellant of the date of trial.

The respondent, in the affidavit submitted in support of the motion to vacate the default decree, emphatically stated that neither Frank H. Cooper nor Frank Delaney advised him that the case would come on for trial on November 23, 1954. The respondent, in that affidavit, stated that as late as 1953 Mr. Delaney advised him that he was no longer respondent's lawyer; that respondent had paid Mr. Delaney $30,000 in the year 1952 for the purpose of representing him in different matters and that when he was advised that Mr. Delaney did not represent him any more he requested Mr. Delaney to turn over the

files in the instant case, as well as in other cases, which he refused to do, requesting additional fees, even though the services rendered on behalf of the respondent did not have a value of anything like the $30,000 already paid.

George Stathos, an associate of the respondent, stated in an affidavit submitted on behalf of the respondent in support of the motion to vacate the default decree, that Mr. Delaney did advise him on the telephone that the case would be reached in the early part of December. Mr. Stathos also corroborated the statement made by the respondent that Mr. Delaney requested additional fees of $20,000, even though he had already received $30,000, and that he had refused to turn over the files to the respondent unless he received the additional sum of $20,000.

The default on the part of the respondent was therefore neither wilful nor intentional. Mr. Cooper's presence during the course of the inquest and his participation, or lack of participation, conclusively establishes that the respondent was not represented at the trial. If the presence of Mr. Cooper at the trial be considered a form of representation then again it is clear that such participation by Mr. Cooper was not the representation of an attorney on behalf of a client but that the representation, if it can be called such, was clearly antagonistic to the respondent.

Mr. Cooper, after making derogatory and accusing statements against the respondent with respect to the vessel "Basile," in a half-hearted manner asked the Court below for an adjournment of the trial. Did Mr. Cooper expect the Court below to grant an adjournment when he advised the Court that the respondent, through machinations, turned the vessel over to the mortgagee (which was the Bankers Commercial Corporation, a reputable company), and informed the Court that since that time he had not seen hide nor hair of the respondent since and that he did not know where he was, other than he was supposed to be

in London, and had no knowledge of when he was coming back? After practically inviting a denial of the motion for an adjournment, and the application was denied, Mr. Cooper stated "Then I will sit here and just see what is happening."

Having taken that position Mr. Cooper should not have told the Court that he did not challenge the authenticity of certain documents offered on behalf of the libellants. Towards the end of the trial, when the Court asked whether there was any testimony by the respondent, Mr. Cooper stated as follows: "If the Court pleases I guess I have been under a misapprehension. I thought this was an inquest. We have defaulted."

Further, at the very conclusion of the case, before the Court below rendered a decree for the libellants, Mr. Cooper stated as follows: " * * * I think I may ask Mr. Graham to include in his claim here our claim for fees because we have never been paid." This statement is contradicted by both the respondent and Mr. Stathos in their affidavits in support of the motion to vacate the default decree. This request of Mr. Cooper is consistent with the statements made by the respondent and Mr. Stathos that the attorneys for the respondent had refused to represent him unless they received additional fees.

From the available facts it is clear that had Mr. Cooper participated and defended the action, even without the presence of the appellant, no judgment would have been obtained against the respondent because the libellants did not have the proof necessary to sustain the allegations of the libel.

No written notice was served upon the respondent of the application for judgment at least three days prior to the hearing of such application as required by the Federal

Rules of Civil Procedure. Rule 55(b)(2) of the Federal Rules of Procedure reads as follow:

> "(b) Judgment. Judgment by default may be entered as follows:
>
> * * * *
>
> "(2) By the Court. * * * If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States."

In the case of *Bass v. Hoagland, supra,* the Court, in discussing Rule 55 (b) (2) of the Federal Rules of Civil Procedure, stated, at page 209, as follows:

> "* * * We believe that a judgment, whether in a civil or criminal case, reached without due process of law is without jurisdiction and void, and attackable collaterally by habeas corpus if for crime, or by resistance to its enforcement if a civil judgment for money, because the United States is forbidden by the fundamental law to take either life, liberty or property without due process of law, and its courts are included in this prohibition. * * *"

and again at page 209 stated as follows:

> "* * * There was appearance and pleading as the summons required, and a demand for jury trial by the plaintiff which operated as a demand by the

defendant also unless withdrawn by his consent, which was not given. Rule 38(a, b, d). The judgment nevertheless recites that there was a default because counsel for defendant at some previous date withdrew as such. There was no withdrawal of the defendant's appearance and pleading and demand for a jury. The case was still not in default and thereby confessed. If the plaintiff wished to present it to the court as in default, he was bound to notify the defendant or his counsel three days in advance of the hearing. Rule 55(b)(2). The withdrawal of counsel did not make the notice unnecessary, but made it servable on the defendant instead of his counsel. It was not given and the judgment does not recite that it was. It does say that evidence was heard, presumably on the question of damages, but there was no jury verdict thereon as required by Rules 38 and 55(b)(2). The answer says there was no evidence heard at all, and this is admitted for the present, and an admitted fact may be used on collateral attack as well as the record itself; 49 C. J. S., Judgments, §§ 421, 425, Note 17. The court reporter's record would show the actual truth. The remarkable fact appears on the face of the judgment that the damages in a personal injury suit were fixed in the exact amount sued for, and 'Approved' by plaintiff's counsel. The judgment states the plaintiff was not present at the trial, but only his counsel; and that no defendant was present in person or by counsel, so there could have been no waiver of any right. Bass, living in Texas, did not know that the case had been called for trial till he was served in the present suit. This does not look like due process of law under the Constitution, nor even like a judicial trial. * * *"

In the case at bar, too, the action of Mr. Cooper constituted a withdrawal and the respondent was entitled to three days' notice, as provided by Rule 55(b)(2) of the Federal Rules of Civil Procedure. The fact that Mr. Cooper was in court did not alter the facts of the situation. There had been no notice to the respondent and no

written notice to Mr. Cooper that a judgment would be sought on November 23, 1954, by default, as required by Rule 55(b)(2). This is particularly true in the case at bar, when Mr. Cooper indicated to the District Court an antagonistic attitude toward the respondent and made the statement that he was not participating in the proceeding.

B.

In a case involving a judgment of over $130,000, where the decree contains a provision for execution against the person, the matter should not be determined by default if it can be reasonably avoided, and any doubt should be resolved in favor of the application to set aside the judgment so that the case may be decided on its merits.

The respondent should be given an opportunity to try the case on the merits represented by counsel desirous of protecting the interest of his client. It is difficult to understand how counsel permitted a decree containing a provision for execution against a person where the amount is over $130,000 to be entered without taking some affirmative step to ascertain the whereabouts of Hanioti, the appellant, and giving him an opportunity to defend himself and to answer the application of such nature.

The courts have held that matters involving large sums should not be determined by default judgment if it can be reasonably avoided and any doubt should be resolved in favor of petition to set aside judgment so that cases may be decided on their merits.

Tozer v. *Charles A. Krause Milk Company*, 189 Fed. 2d 242;

Henry v. *Metropolitan Life Insurance Company*, 3 F. R. D. 142.

POINT IV

The inclusion of a provision for execution against the person of the respondent in the decree violated the respondent's legal rights.

A.

The libel did not set forth a cause of action on contract, with an allegation of fraud in the incurring of the liability.

The body execution was included in the decree and judgment pursuant to the purported authority of Rule 20 of the Admiralty Rules, which provides as follows:

> "In all cases of a final decree for the payment of money, the libellant shall have a writ of execution, in the nature of a fieri facias, commanding the marshal or his deputy to levy and collect the amount thereof out of the goods and chattels, lands and tenements, or other real estate of the respondent, claimant, or stipulators. And any other remedies shall be available that may exist under the state or federal law for the enforcement of judgments or decrees."

Assuming, for the purposes of this argument, that Rule 20 authorizes a body execution in a proper admiralty case, the validity of the inclusion of the body execution in the instant case is governed by the New York State law.

The Court below granted the body execution on the authority of Section 826, subdivision 9, of the Civil Practice Act, which provides as follows:

> "In an action upon contract, express or implied, where it is alleged in the complaint that the defendant was guilty of a fraud in contracting or incurring the liability, or that, since the making of the contract, or in contemplation of making of the same, he has removed or disposed of his property with intent to defraud his creditors, or is about to remove or

dispose of the same with like intent; but where such allegation is made, the plaintiff cannot recover unless he proves the fraud on the trial of the action; and a judgment for the defendant is not a bar to a new action to recover upon the contract only."

The question arises, therefore, whether the libel in the instant case sets forth a cause of action upon contract. It is submitted that it does not. The gravamen of the libel is fraud.

The libel does not allege, as required by Section 826 (9) of the Civil Practice Act of the State of New York, that the respondent was guilty of fraud in contracting or incurring the liability, or that, since the making of the contract, or in contemplation of making of the same, he has removed or disposed of his property with intent to defraud his creditors, or is about to remove or dispose of the same with like intent. Nor did the appellant, as required by said section, prove the frauds at the inquest.

It is insufficient to satisfy Section 826, subdivision (9), that a complaint set forth some allegations of contract and some allegations of fraud. It is essential that the fraud be perpetrated in incurring the liability on the contract. *Novotny* v. *Kosloff*, 214 N. Y. 12.

B.

There was no evidence offered at the inquest to prove that the respondent committed any fraud or that he conveyed any assets in fraud of creditors.

In the State Court, under Section 826, subdivision (9), it is necessary for a plaintiff not only to plead a cause of action in compliance with its requirements but also to prove "the fraud on the trial of the action; * * *." It is respectfully submitted that there was not one iota of evidence submitted before Judge Walsh, at the inquest, to prove any of the requisite allegations of fraud.

What was said under Point II of this memorandum is equally applicable here and, for the sake of brevity, will not be repeated.

C.

The issuance of the body execution was an abuse of discretion.

Assuming, for the purposes of this argument, that the Court in a proper case would be authorized to issue a body execution, it is respectfully submitted that it was an abuse of discretion to issue one under the circumstances of the present case.

Section 764 of the Civil Practice Act provides, in part, as follows:

> "* * * The issuance of the (body) execution shall rest in the discretion of * * * the court or judge."

The quoted provision was enacted into the Civil Practice Act in 1940. Prior thereto the issuance of body executions had been granted to judgment creditors as a matter of right, if the case came within the appropriate provisions of the Civil Practice Act.

It is respectfully submitted that a body execution should not be granted except when the granting thereof will aid the judgment creditor in the enforcement of his judgment. In the present case the judgment requires the respondent to pay (inclusive of interest) the sum of approximately $200,000.00. The libel alleged that he was hopelessly insolvent in 1946 and 1947. There is no proof in the record to show that he became enriched, or even solvent, thereafter.

The only incidents which would follow upon the upholding of the body execution in the instant case would be to commit respondent to prison without any financial benefit to the libellants. The process of the Court would therefore

be purely punitive rather than in aid of the enforcement of a judgment. It is submitted that that would constitute a subversion of the civil mandates of this Court.

If respondent is deserving of any punishment (and we submit that the record before this Court utterly fails to show that he is), the proper tribunal for meting out such punishment is a criminal court, particularly is this so in the present case, where the respondent has been tried in absentia, unrepresented by counsel. Concededly, a defendant could not be imprisoned after a trial in absentia in a criminal case, where he is charged with a felony.

D.

The rules of admiralty do not authorize the issuance of a body execution in the enforcement of admiralty decrees or judgments.

A reading of Rule 20 of the Admiralty Rules shows that it contains two sentences. The first sentence authorizes the issuance of an execution against the property of a respondent to enforce a decree of judgment in admiralty. The second sentence provides that "any other remedies shall be available that may exist under the state or federal law for the enforcement of judgments or decrees."

It is submitted that the second sentence of Rule 20 cannot be read so as to incorporate into the first sentence the right to enforce a decree by the issuance of a body execution. If it had been intended by Rule 20 that a body execution could be used to enforce an admiralty decree it would have been a simple matter to have so provided in the first sentence. The only reasonable construction that can be placed upon the second sentence of Rule 20 is that a libellant shall have the right to avail himself of all remedies of the state or federal law for the enforcement of the execution against the property of the respondent, as for example,

supplementary proceeding, receiverships, third party orders and subpoenas, etc.

It is submitted that it is stretching the first sentence of Rule 20, by implication, to incorporate therein the odious remedy of a body execution, which is the last vestige of the archaic remedy of imprisonment for debt. The Rules of Admiralty were promulgated by the Supreme Court of the United States. It is respectfully submitted that had the Supreme Court intended that a body execution be available to a libellant for the enforcement of an admiralty decree the Supreme Court would not have left it open to implication but would have expressly so stated.

A case in point is *Friedly et al. v. Giddings et al.*, 119 Fed. 438. In that case the plaintiff moved for a writ of body execution, according to the state statutes. The Court denied said motion stating, at page 441, as follows:

> "The plaintiffs have moved for an adjudication by the court that the cause of action arose from the wilful and malicious act of the defendants, and that they ought to be confined in close jail, and for a certificate thereof upon the execution, according to the statutes of the state (V. S. 1751). The statute of the United States providing that the practice, pleadings, and forms and modes of procedure in civil causes other than those in equity and admiralty cases shall conform to those in the state courts, applies to those for procuring the judgment, and not to those subsequent (Rev. St. U. S. 914 [U. S. Comp. St. 1901, p. 684]; Ex parte Fisk, 113 U. S. 713, 5 Sup. Ct. 724, 28 L. Ed. 1117); *and that entitling the party recovering a judgment in a common law cause to similar remedies upon it to those of the state 'to reach the property of the judgment debtor' applies to property and not to the person* (Rev. St. 916 [U. S. Comp. St. 1901, p. 684]). This motion therefore cannot prevail" (emphasis writer's).

So in the instant case, the "similar remedies" provided in the state statute apply only to the property and not to

the person of the judgment debtor. In that connection it must be noted that the requirements of the Revised Statute known as Section 916, on which the *Friedly* decision, *supra*, is based, are presently incorporated in Rule 69 of the Federal Rules of Civil Procedure and that the language of said Rule is very similar to Rule 20 of the Admiralty Rules. It appears from the *Friedly* case that since Rule 69 does not expressly refer to body execution the proceedings supplemental to and in aid of a judgment refer only to proceedings against the property and not against the person of a judgment debtor.

E.

The decree and judgment are equitable in nature; hence, the body execution is unauthorized.

The decree in the instant case provides that " * * * Basil Hanioti is hereby directed to pay said sum of $130,383.69 and costs in the sum of $35.00, making in all the total sum of $130,418.69, with interest thereon at 6% from the 23rd day of July, 1947, until paid, to the libellants through their proctor, Harry D. Graham, Esq., for distribution amongst them together with their costs as taxed; * * * " (App. 17a). Said decree is clearly equitable in nature for it directs respondent to pay a sum of money. A judgment in an action at law could not properly contain any such direction but the Court could only grant judgment to a plaintiff.

An analysis of Section 764 of the Civil Practice Act reveals that a body execution is authorized only to enforce a judgment in an action at law. A judgment directing a plaintiff to pay a sum of money is equitable in nature and may, in a proper case, be enforced by contempt proceedings but not by a body execution (Sections 505; 764, of the Civil Practice Act).

A case in point is *B. I. P. (Export), Limited* v. *Isaacs et al.*, 10 Fed. Supp. 872. Said suit was brought in equity

and the plaintiff moved to amend the judgment by inserting a provision for execution against the body of the defendant. However, the Court denied said motion, stating, at page 873, as follows:

> "Execution against the person, by New York law, may issue where the action is one of those in which the defendant may be civilly arrested because of the nature of the cause of action. Civil Practice Act, § 764. The actions wherein a civil arrest of the defendant is available to the plaintiff are set forth in section 826. Among them is an action to recover for money received against a person in a fiduciary capacity. But the New York courts have held that execution against the person cannot be issued in a suit in equity, except in those cases where a common law action is brought on the equity side for special reasons. Fenton v. Duckworth, 131 App. Div. 291, 115 N. Y. S. 686; Broome v. Cochran, 31 Misc. 660, 64 N. Y. S. 1043."

In the instant case too the decree directing respondent to pay a certain sum of money is equitable in nature and the Court below had no power to issue body execution in connection therewith.

F.

The body execution is unauthorized inasmuch as there was no trial of the action, within the meaning of Section 826, subdivision (9) of the Civil Practice Act.

As previously pointed out, it is incumbent upon a plaintiff to establish the necessary fraud allegations on the trial of the action in order to obtain a body execution. This provision has been given a strict construction by the New York courts, whose decisions are controlling on the instant question. In the case of *Collins et al. v. Toombs*, 63 N. Y. Supp. (2d) 545, the Appellate Division of the New York Supreme Court, Third Department, reversed an order denying a motion to vacate a body execution which had

been obtained by the plaintiff after the defendant had defaulted on the plaintiff's motion for summary judgment. The Court, at page 546, held as follows:

> "* * * if the action is held to be on contract, with an allegation of fraud, the plaintiff would have been entitled to recover on the theory of fraud, and to an order of arrest, only when he proved fraud on the trial of the action." (C. P. A., section 826, subdivision 9). A summary judgment proceeding is not a trial but merely a proceeding to determine if there are triable issues of fact that require a trial."

By the same token, an inquest is not a trial. There is no opportunity on the part of the defaulting party to cross-examine witnesses or to produce his own witnesses. The proceeding is purely *ex parte* and has no stronger basis than affidavits on a motion for summary judgment.

The rationale of the *Collins* case, *supra*, is sound for it requires proof on the stand rather than by affidavit to justify what amounts to imprisonment for debt. This is particularly applicable on the default in the present case where the appellant did not sit idly by but hastened to move to set aside the decree on the very day following the granting of said decree.

POINT V

The appeals were timely and the Court of Appeals had jurisdiction of the appeals taken from the orders denying the motion to set aside the default decree as well as the appeal from the default decree docketed as a judgment.

The respondent appealed from the decision and order of January 11, 1955, by notice of appeal dated and filed February 9, 1955—within a period of less than thirty days. The respondent appealed from the opinion, decision and

order of February 9, 1955, by notice dated and filed February 17, 1955—within a period of less than thirty days. The respondent also appealed from the decree docketed as a judgment on January 11, 1955, by notice of appeal dated March 24, 1955—within a period of ninety days from the docketing of the decree.

All of the appeals were timely and properly taken. The orders from which the appeals were taken were based upon a motion to set aside a default decree entered after inquest. Such orders are final because they affect the ultimate outcome of the controversy.

A case in point is *Weilbacher* v. *J. H. Winchester & Co.*, 197 Fed. (2d) 303 (U. S. C. A. 2 Cir.), wherein the Court, in discussing the question of the finality and appealability of orders based upon motions to set aside judgments, stated, at page 305, as follows:

> "At the outset we must determine whether the order appealed from is a final order within the purview of Section 1291 of the Judicial Code. 28 U. S. C. A. § 1291. Obviously, the objective of that section is to forestall appellate review when the decision below has but an inconclusive effect on the final outcome of the litigation. *This is best illustrated in the example of a motion, also under Rule 60(b), to reopen a default judgment. Thus, the denial of such a motion is a final order, Tozer* v. *Charles A. Krause Milling Co.*, 3 Cir., 189 F. 2d 242, *for by its decision the district court has indicated that no further action will be taken at that level which will change the outcome and unless the order is appealable the controversy is at an end. On the other hand, the granting of the motion is not reviewable, United States* v. *Agnes*, 3 Cir., 161 F. 2d 231, *since the ultimate disposition of the case may not be affected thereby*" (italics ours).

Another case in point discussing the finality and appealability of an order such as in the instant case is *Green-*

spahn v. *Joseph E. Seagram & Sons*, 186 Fed. (2d) 616, (U. S. C. A. 2 Cir.), where the Court, at page 619, stated as follows:

> "* * * But we are willing to go further and state our belief that the order is appealable as fully as any other final order. Rule 60(b) expressly provides that a motion made thereunder 'does not affect the finality of a judgment or suspend its operation'. An order denying such a motion puts an end to any further action by the district court and leaves the judgment in full force and effect. We think it is a final order and therefore appealable."

In *Stevirmac Oil & Gas Co.* v. *Dittman*, 245 U. S. 210, 38 Sup. Ct. 116, the Court, at page 118, stated as follows:

> "The plaintiff in error correctly contends that the proceeding to set aside the original judgment is in effect an independent action, and the judgment therein final and reviewable. The proceeding to set aside the original judgment is based upon the theory that *no jurisdiction was acquired over the Stevirmac Oil & Gas Company* by the service of the process as amended by the court's order, and hence the company was never properly subject to the jurisdiction of the court in the original suit. No contention is made that the court could not entertain the proceeding to set aside the judgment, indeed it did entertain jurisdiction and decided against the contention of the plaintiff in error. In such case we have no doubt that in view of the nature of the attack made upon the original judgment, the judgment in the present proceeding was final, and reviewable in the Court of Appeals" (italics ours).

Assuming, without conceding, that the docketing of the decree as a judgment on January 11, 1955, did not fix the time for the commencement of the ninety day period, as contended by the libellants, the appeal taken on March 24, 1955, was still timely since under Rule 73(a) of the Federal

Rules of Civil Procedure the running of the time of appeal was tolled by the motion made to set aside the judgment and therefore the time to appeal must be computed from the entry of the order denying the motion to vacate the judgment, to wit, January 11, 1955, the date of the first decision, or February 9, 1955, the date of the filing of the opinion and order. Cases supporting this rule are:

Leishman v. *Associated Wholesale Electric Co.*, 318 U. S. 203, 63 Sup. Ct. 543, 544;

Salmon et al. v. *City of Stuart, Fla.*, 194 Fed. (2d) 1004 (U. S. C. A. 5 Cir.).

In *United States ex rel. Harrington* v. *Schlotfeldt*, 136 Fed. (2d) 935, the Court, at page 937, stated as follows:

> "Appellee urges that the appeal is improperly before us in view of the fact that notice of it was filed on December 28, from a decree entered September 22. The court permitted the filing of a motion to vacate the decree on December 19, ordered the Government to answer, and set the matter for hearing. Where such motion to vacate is permitted to be filed and taken under consideration prior to the expiration of the period allowed for taking an appeal, we are of the opinion that it suspends such period, and that notice of appeal duly filed after disposition of the motion is filed and timely. Cf. Zimmern v. United States, 298 U. S. 167, 56 S. Ct. 706, 80 L. Ed. 1118; Wayne Gas Co. v. Owens Illinois Glass Co., 300 U. S. 131, 57 S. Ct. 382, 81 L. Ed. 557. We think the Federal Rules of Civil Procedure, Nos. 6, 59 and 60, 28 U. S. C. A. following section 723c do not require a contrary ruling."

To the same effect see:

Reliance Life Insurance Co. v. *Burgess*, 112 Fed. (2d) 234;

Neely v. *Merchants Trust Co. of Red Bank, New Jersey*, 110 Fed. (2d) 525.

CONCLUSION

For all of the foregoing reasons the judgment of the Court of Appeals for the Second Circuit should be, in all respects, affirmed.

Respectfully submitted,

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